1879

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motion denied Jan. 22. 1880

TRANSCRIPT OF [illegible]

SUPREME COURT OF THE UNITED STATES.

No. 1098.

AUGUSTUS P. WRIGHT AND ALFRED SHORTER, PLAINTIFFS IN ERROR,

vs.

GEORGE W. NAGLE, DANIEL ADAMS, HINES SMITH, AS TRUSTEE FOR HIS WIFE, AND HUGH D. COTHRAN.

FEDERAL BAR ASSOCIATION

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED DECEMBER 22, 1879.

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1 CLERK'S OFFICE, SUPREME COURT OF GA.,
Atlanta, Ga., Sept. 11th, 1879.

I, Z. D. Harrison, clerk of the supreme court of the State of Georgia, hereby certify that the following pages hereto attached contain true and complete copies of the judgment and opinion of the said supreme court in the case of A. R. Wright et al., pl'ffs in error, vs. Geo. W. Nagle et al., def'ts in error, and of the transcript of the record and bill of exceptions in said case, together with a copy of the bond for costs in the Supreme Court of the United States, and the original citation and writ of error; all of which appear from the records and files of this office.

Witness my signature and the seal of said court affixed the day and year above written.

[SEAL.] Z. D. HARRISON,
Clk S. C. Ga.

2 Supreme court of the State of Georgia.

A. R. WRIGHT ET AL., PL'FFS IN ERROR,
vs.
GEO. W. NAGLE ET AL., DEF'TS IN ERROR.

TUESDAY, *March* 25, 1879.

This case came before the court upon a transcript of the record from the superior court of Floyd County, and after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

A. R. WRIGHT ET AL., PL'FFS IN ERROR,
vs.
GEO. W. NAGLE ET AL., DEF'TS IN ERROR.

JACKSON, J., delivering the opinion.

This case is controlled by the principle of the decision of this court in the case of Wright et al. vs. Nagle et al., between the same parties, reported in 48th Ga. R., 318, and in 58 Ga. R., 606.

Judgment affirmed.

3 GEORGIA,
Floyd County:

Be it remembered that on the 9th day of July, 1878, during a regular term of Floyd superior court, which is also a court in chancery, his honor George N. Lester, one of the judges of the superior courts of said State, then and there presiding, the cause of Alfred Shorter and Augustus R. Wright against George W. Nagle, D. Adams, A. M. Smith, trustee, & Hugh D. Cothran, then and there depending on the equity side of the court, came on to be heard. The parties having announced themselves ready, and an agreement of record having been entered into that the judge presiding decide such case without the intervention of jury, upon the bill and answer and admissions of said agreement, the counsel for complainants proceeded to read the bill, which stated, in substance, that Alfred Shorter, in the year 1850, or those under whom he claimed, believing he had an exclusive right to the bridge and ferry privileges in and about the city of Rome, sought an injunction against the building of two new bridges by the inferior court of said county,

upon whom had been conferred by the legislature the right &
4 duty to provide by contract for the erection of ferries and building of bridges. That said case was decided adversely to complainant, on the ground that the inferior court, though having the power to do so, had not granted him an exclusive charter; that there were no words of exclusiveness in the grant or contract, and none could be implied, notwithstanding the parties so understood it. That thereupon the said Shorter purchased of the inferior court, by building new bridges at such places as they designated, & other payments & grants of right, amounting to fifty thousand dollars, or other large sum, a new charter, with necessary & proper words of exclusion, to all ferry and bridge privileges for three miles up and down these three rivers, to wit, the Etowa, and the Oostanaula, and the Coosa, made by their *in*junction, and in the fork of which rivers said city of Rome was situate. That afterwards said Shorter sold to said Wright, for twenty-five thousand dollars, one-half interest in said bridges and ferries, and all their rights & privileges. That bridges being built were destroyed during the rebellion, or the war among the States, as the case might be, by the
5 Confederate forces; that immediately upon the declaration of peace they were notified by the inferior court to rebuild or their charter would be granted to others; which they did at great expense, building double tracks, when before they were single tracks.

That in the year 1870 a company called the South Rome Company, composed of the defendants, by charter from the board of commissioners for the county of Floyd, the successors of said inferior court by law, were proceeding to build a new bridge across the Etowah within the franchise of complainants, when they filed this their bill seeking both temporary and permanent injunction, alledging the probable incapacity of the company to respond in damages and also irreparable damages.

The answer of defendants was then read, substantially admitting the facts of the bill and also the agreement of record, permitting the judge to decide without a jury, & other matters.

And said cause being closed on both sides and argument had, the presiding judge, George N. Lester, proceeded to make the following decision:

July term, 1878.

6 This case coming before the court for final hearing and adjudication upon the agreement of parties shown in the record, that the same may be adjudicated and tried by the court without the intervention of a jury, as therein shown, the court, upon considering the bill and answer and amendments & the facts therein stated as admitted and referred to in the aforesaid agreement of the parties and the facts in said agreement itself agreed upon by the parties, makes the following decision and renders the following decree:

It is adjudged that the inferior court of the county of Floyd had no power to grant an exclusive franchise to H. V. M. Miller at the time the contract alledged to have been made was enacted.

It is further adjudged that said inferior court had no power in making said contract to limit the right of their successors in the exercise of their powers in an official capacity to grant similar franchises or privileges to other persons, nor did the terms of the contract with H. V. M. Miller have that effect.

It is further adjudged that the board of commissioners of roads
7 & revenues of Floyd County, as the successor of the inferior court, had the power to grant the respondents upon application the right

to build a bridge across the Etowah River at the end of Howard street, in the city of Rome, and in the exercise of that power did not infringe upon the grant to Miller, did not impair the obligation of the contract with him, & was not violation of the Constitution of the United States, as alledged by complainants. It is therefore decreed by the court that the injunction prayed for by the compl'ts be finally refused, & that the bill of complainants be finally dismissed.

And that respondents recover of complainants dollars costs.

July 9th, 1878.

GEO. N. LESTER, *J. S. C.*

Which decision upon the case made the counsel for complainants allege to be erroneous, and on this the twenty-ninth day of July, 1878, being within thirty days from the trial of said case, tender this their bill of exceptions and say the court erred—

First. In holding the inferior court had no power to grant an exclusive franchise upon full consideration paid & bridges built ac-
8 cording to contract for the benefit of the people and the passing of the people of the county free and at half price.

Second. In holding that the supreme court of Georgia, deciding that the inferior court was the agent of the State of Georgia to make an exclusive grant, in 1850 was not the law of this case, whether it originally had such power or not; and that a contract made in pursuance thereof was void.

Third. In holding that the quiet & exclusive use of said privileges for twenty years did not give complainants a prescriptive right.

Fourth. In holding the board of commissioners had power to grant any such bridge privilege without just compensation having been first paid compl'ts.

And complainants ask that this their bill of exceptions may be certified and signed, as required by the statutes in such case made & provided.

E. N. BROYLES,
AUGUSTUS R. WRIGHT,
Sols. for Comp't.

9 JULY 29TH, 1878.

I certify that the foregoing bill of exceptions is true and consistent with what transpired in said cause before me, and contains all that is necessary to a clear understanding of the case. I, the clerk of the court, will certify & send up the record in said case as provided by the law.

GEO. N. LESTER,
J. S. C., B. R. C.

I acknowledge due & legal notice of this bill of exceptions and waive any other further notice or copy, and the giving of bond a payment of costs, and consent the fifth specification may be filled in at any time before the hearing by the supreme court.

July 29th, 1878.

J. BRANHAM,
Def't's Sol'r.

10 GEORGIA,
Floyd County:

I, A. E. Ross, clerk of the superior court in and for said county, do

hereby certify that this is the true, original bill of exceptions filed in my office, just as it came from the judge; that I have made a copy of the same, which is now on file in my office.

Given under my hand and seal of office at office in Rome, Ga., this August 12, 1878.

A. E. ROSS,
Clk S. C. F. C.

11 GEORGIA,
Floyd County:

To the honorable R. D. Harvey, judge of the superior court of the Rome circuit, and having jurisdiction of equity therein:

Humbly complaining, sheweth unto your honor, your orators, Alfred Shorter and Augustus R. Wright, both of the county aforesaid, that heretofore, to wit, some time in the latter part of the year 1850, or the beginning of the year 1851, Alfred Shorter and sup-
posing that they were the owners and proprietors exclusively, both by right of prescription and also contract with the inferior court of Floyd County, to all ferry and bridge privileges on the rivers Etowah and Oostanaula and Coosa, in and about the city of Rome, and the charging of toll for transportation on the same, and the inferior court of the county aforesaid essaying to build and have constructed certain other bridges in and about said city, materially damaging said privileges, franchises, and contracts, filed their bill of injunction to restrain the building of the same. The said case came on for a hearing before Judge John H. Lumpkin on the 12th day of April, 1851, and the injunc-
12 tion was refused by him. From this decision an appeal was had by their complainants to the supreme court of said State, and the decision below was confirmed. The supreme court deciding and holding that said complainants had a good and valid title to said ferry and bridge franchises and privileges, but that the same was not exclusive, and the inferior court did have the right to build other bridges and establish other ferries. In the mean time said inferior court had involved itself in contracts for the building of other bridges. These complainants beg leave to refer to the said case and the decision as often as may be necessary for either party, and have not attached a copy of the same, because it would greatly increase the record. It is found in 9th volume Georgia Reports (page 517). They further decided, and it thereby became the law as expounded by the highest tribunal of the State, that if an exclusive grant was intended by the inferior court it ought to have been and must be contained in their contract.

The inferior court having involved itself in liabilities upon contracts for the building as aforesaid of other bridges, and especially with one William R. Smith, to be built at Smith's ferry, and a bluff of
13 lime rock at the upper end of town, across the Etowah, amounting to several thousand dollars, and one at the foot of Bridge street in front of the court-house; a large part of the funds which had been subscribed failing to be paid, and in view of said decision, and with express reference to the same, made certain propositions to Dr. H. V. M. Miller as one of said bridge company and representative of the same, offering, on certain conditions, to grant power to said company and their heirs and assigns, all bridge and ferry privileges about the city on said rivers for three miles from the junction at the head of Coosa river, and to give to them the exclusive use and control of the same forever, and forever debar'ed themselves and their successors from establishing any other bridges or roads in anywise affecting or injuring their

privileges, a copy of which said agreement is hereto inserted marked Exhibit No. 1, and which, with its appended order extending the time for the execution, is also recorded on the minutes of said inferior court. It is as follows:

Exhibit No. 1.

Floyd inferior court, at a called term, July, 1851.

By an order of the inferior court heretofore passed, subscribing
14 the sum of five hundred dollars to be appropriated to the erecting of free bridges across the two rivers, to wit, the Etowah and Oostanaula, and in order more effectually to carry out said object, said court appointed a committee of five to take up private subscriptions and contract for the building of said free bridges upon the faith of the said several sums subscribed; and in conformity with said order said committee proceeded to take up subscriptions for the aforesaid purpose, and thereupon entered into a contract for building a bridge across the Etowah River, and after every effort being made on the part of said committee, which has been made known to said inferior court, by the petition of said committee for relief, setting forth in said petition that they could not raise money; that those having subscribed for said purpose on being called on have refused or failed to pay, and which failure or refusal is likely to inure to the great damage of said committee in the erection of said bridge; therefore they ask of said court to make some arrangement by which they, the said committee, may be released from heavy expense, now thrown upon them by reason of the failure of the citizens of Floyd County to subscribe and pay to said committee.

15 Upon the aforesaid acts being made known, in order more effectually to relieve said committee, it is ordered by the court that the following contract be offered to H. V. M. Miller, one of the original bridge company; that for and in consideration of the large reduction in tolls to said company, and the removal of the new bridge across the Oostanaula up to the foot of Court House street, leading with it, being the place *the place* at which the original bridge on said river was located, or the erection of a new bridge at said place, to be built or removed during the present summer or fall, and then the present bridge to be closed up, and the further consideration of the relief of the first aforesaid committee and court, in all the expenses they have in anywise incurred in erecting the half part of the new bridge now being built at the Rock Bluff, on the Etowah River, by one William R. Smith and the committee as aforesaid, and that said bridge be completed, provided nothing is hereby done to destroy the remaining half interest of said bridge belonging to said Wm. R. Smith, according to the con-
16 tract as entered into between the said Smith and inferior court, as changed and altered on the 27th day of May, 1851, and for and in consideration of said several causes moving, it is agreed and ordered by said inferior court that franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Oostanaula at or near the city of Rome, county of Floyd, be, and the same is hereby, vested in and secured to the said H. V. M. Miller, his heirs and assigns forever, and that the franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Etowah River at or near the city of Rome be, and the same is hereby, vested in and secured to said Miller, his heirs and assigns forever, and that the said

franchises and privileges on the aforesaid rivers and the Coosa extend three miles from said junction every way, provided the same does not interfere with rights heretofore vested; and the half interest in said bridges, as first aforesaid, is hereby secured to the said H. V. M. Miller, his heirs and assigns, in as full and complete a manner as by law can be transferred by said court to said Miller, so far as the same *as*
17 is not vested in the said William R. Smith, his heirs and assigns, as set forth in said mentioned contract with said Smith, bearing date the 27th day of May, 1851.

And the said H. V. M. Miller binds himself, his heirs and assigns, to keep in good repair the bridges, to wit, the one at the point designated as aforesaid across the Oostanaula and one across the Etowah at the foot of Broad street, at the city of Rome, county of Floyd, in good repair for the trading public generally; and the tolls and privileges to be equally extended to the citizens of said county of Floyd, at each of the respective bridges, according to the basis of tolls agreed upon by said court.

The franchises and privileges heretofore and at present being in an unsettled state, causing much litigation and trouble to all parties, for the relief of which and the aforementioned considerations this charter or contract is set forth to more fully define and secure to all parties their rights, and any omission in detail shall not preclude the aforesaid Miller the full and exclusive privilege within the aforesaid contract to the full and complete franchise, both public and private, against themselves and their successors, and others, so far as they are by law
18 empowered, hereby debar'ing themselves from the privilege of confer'ing any further privilege and franchise in anywise to individuals or otherwise, by means of which the aforesaid franchise may be impaired; also revoking all orders or decrees of said court in anywise conflicting with privileges and franchises hereby granted, provided the same is not now in use by others.

And the said Miller further binds himself, his heirs and assigns, not to erect a bridge or bridges across the Coosa River from the junction to the extent secured in the foregoing charter, nor confer the privilege to any one else whereby it may injure the interest of the city of Rome.

Four-horse wagon, cotton or other produce for market	25 c.
" " " corn	50
Two " " "	25
" " carriage and barouch', 30	40
Buggy and horse	20
Mare and horse	10
Foot men	5

And the tolls imposed on the citizens of the county of Floyd shall be as follows, viz:

19 Four-horse wagons	25 c.
Two " "	15
Close carriages	25
Barouche	20
Buggies and one-horse wagons	10
Wood, fodder, shucks, bricks, market provisions not to exceed 5 per cent. on the value of the load	
Four-horse wagon load of lumber to and from	20
Two " " " " " " " "	10

Going to and from church on Sunday free upon all the bridges.

It is therefore agreed by the said inferior court and the said H. V. M. Miller that the foregoing contract for the more faithful and full compliance of the same be signed by said inferior court and said H. V. M. Miller and the same be entered upon the minutes of said court.

J. M. SPULLOCK, *J. I. C.*
DENNIS HILLS, *J. I. C.*
WM. T. PRICE, *J. I. C.*
F. I. SULLIVAN, *J. I. C.*
H. V. M. MILLER. [L. S.]

Whereas the inferior court of Floyd County having heretofore
20 granted a charter to H. V. M. Miller, his heirs and assigns, for the purpose of erecting bridges across the Etowah and Oostanaula Rivers, near the city of Rome, and application being made for an extension of one of the stipulations of the charter, by the terms of the aforesaid charter the bridge across the Oostanaula was to have been completed during the summer and fall of eighteen hundred and fifty-one: Ordered by the court that the time for the completion of the bridge be extended until the first day of January, eighteen hundred and fifty-three; nothing in this order to be construed so as to alter or change any other stipulation or requirement of the aforesaid charter. This October 14, 1851.

J. M. SPULLOCK, *J. I. C.*
WM. T. PRICE. *J. I. C.*
F. I. SULLIVAN, *J. I. C.*
DENNIS HILLS, *J. I. C.*

These complainants show that the aforesaid agreement, thus signed and executed, together with the modifying order, constituted a valid contract between the said Miller and the said court, and under the Constitution of the United States could not be impaired, even by leg-
21 islative action, without just compensation.

Some time shortly after said contract was made, to wit: on Alfred Shorter then, and at the time of the contract, one of the company with said Miller, purchased for a valuable consideration the entire interest in said franchises and privileges, and proceeded in the utmost good faith to carry out his part of the contract. One of the considerations was that the new bridge built across the Oostanaula at the junction of that river with the Etowah, and like the bridge across that river at or near the foot of Broad street, should be removed some half mile up said river Oostanaula, at the foot of Bridge street, fronting the court-house, or that it should be closed up and a new one built. The said bridge had just been completed, was covered in, and set on excellent and double stone pillars, and was of the value of twelve or fifteen thousand dollars, or some such sum. This by the contract became a dead loss to said Shorter, except a few hundred dollars for which the lumber sold when pulled down, as it shortly afterward was. The said Shorter built a new and substantial bridge in front of the court-
22 house, as he had contracted to do, on double stone pillars, of the value of a like sum of money. So that what he contracted to lose and what he contracted to do in this matter alone cost him some twenty-five or thirty thousand dollars, or some such sum.

In addition to this, the said Miller had assumed to take the place of the court in a most improvident contract with W'm R. Smith, which said court had made; and this the said Shorter, by his purchase of the entire interest, did assume also. Said bridge was partly constructed, but was

situated at a narrow place in the river, with one end on a steep where the water swept with great force, and before it was ready for use the said bridge was washed away by a flood, and came well-nigh taking the bridge at the foot of Broad street along with it. And another effort being made at the same place, the next one fell down. The said W'm R. Smith was satisfied with his experiments and never proposed to renew said building. His contract with the court was only for
23 twenty years, and has expired. The contractor, Shorter, by assuming this improvident contract for the inferior court, lost several thousand dollars more, thereby saving the people and the county harmless.

In addition to these conditions, the said Shorter, or those under whom he claimed, contracted to keep for the use of the people of Floyd County and the city of Rome, at his and their own expenses, for bridges for all on foot and horse at all times, and all carriages going to and from church on Sabbath and but small tolls at other times, and did reduce the tolls greatly, in accordance with said contract, thus making a most judicious contract for the people. And, further, consents to a reduction of tolls on their former contract with the inferior court, amounting, in a few years, to thousands of dollars, which was done in pursuance of their contract, which by an appeal to the Supreme Court of the United States from the decision of the superior court of the State of Georgia they had reason to believe they might have avoided, as also the other disadvantages of the contract.

Copies of the assignments to said Shorter of the entire interest
24 in said franchises and privileges are hereto attached, marked "Exhibit' 3 and 4," to which leave of reference is asked.

These complainants show that at great labor, trouble, and expense, the obligations of said parties contracting with said court were fully and faithfully performed by them, and have since been by their assigns; and that those under whom they claim, and themselves, have been in the peaceful and quite enjoyment of exclusive privileges under said contract for over twenty years.

Your orators show that on the day of , Augustus B. Wright purchased of Alfred Shorter, then sole owner of said franchises, the one-half interest in the same, at and for the sum of twenty-five thousand dollars; and as such joint owners the said parties, the present complainants, have discharged their obligations, keeping bridges good and safe for the use of the public and people of Floyd on the terms aforesaid, except as hereinafter specified. During the late war between the States of the South and the Federal Government, the Confederate troops upon
25 evacuating Rome burnt both bridges, to wit, on or about the day of ; and they so remained to the close of the war. Nevertheless, immediately upon the evacuation of the city by the Federal forces, at great hazard and some considerable expense, complainants put in good ferry-boats and passed the people over, the same being almost a total loss to complainants; for down to the surrender they continued to take Confederate currency, which was of little more value than the paper upon which it was printed or stamped.

The complainants show after peace was declared, and when the country was almost wholly exhausted of means, they were informed that unless they proceeded to rebuild, and that at once, the inferior cour' would proceed to let out the franchise to other parties; and this, too, notwithstanding complainants had put two boats on the river for the transportation of the people, because, even at this, persons and wagons were blocked up on the bank and compelled to wait for hours. Com-

plainants, at heavy cost, proceeded at once to rebuild both bridges; and whereas before they had been single tracks, they proceeded now to make them wide enough for carriages and wagons to pass each
26 other in the bridges; and this at considerable increase in costs, and when there was no legal obligation to do so, the said bridges put upon their previous stone pillars, costing complainants somewhere between twelve and fifteen thousand dollars.

And complainants charge further, that said inferior court and their successors and the present road commissioners have again and again, in various ways, recognized the franchises and privileges of complainants under said contract.

Complainants show, that some time ago, in the beginning of the present year, a company, designating itself as the South Rome Company, purchased a farm of about three hundred acres, lying on the Etowah River, opposite and against the city of Rome, and some three or four hundred yards above the bridge across the Etowah, owned by complainants, with the avowed intention of speculating on the same, by laying it off into a town, and selling lots; and in order to do this successfully, gave out that they would build a bridge at the end of Howard street, in the city of Rome, across to the opposite bank, owned by them.
27 Alfred Shorter was one of this company at its formation, expecting and believing that some satisfactory arrangement would be made by purchase or otherwise, of himself and his joint owner, Augustus R. Wright, of the privilege to build a bridge. But no arrangement was made, and the said company resolved to build a bridge at all hazards; which, when the said Shorter understood, he sold out his interest in said farm, determined that his franchise should not be interfered with.

Said company, as complainants are informed, is now composed of G. W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh Dickson Cothran, the present mayor of the city of Rome, all of the county of Floyd and city of Rome. Complainants show that the company declare they will build said bridge, either as a free bridge for the public, or as a toll-bridge, and have proceeded to erect on wooden pillars two spans of wood across the Etowah, at the foot of Howard street, and on said street, as complainants are informed; by whose permission complainants know not. Complainants suppose that, in pursuance of their declarations and plans, they will go on to finish the same
28 for the use of the public, either as a toll or free bridge, the same being less than three miles from the junction of the Etowah and Oostanaula, and therefore within the franchise of complainants, and which, if permitted to be done, would greatly injure and impair the rights and franchises of complainants. And though complainants might sue them at law, they are not sure they could respond in damages, as complainants consider said damages must necessarily be heavy, and if capable of responding now, complainants have no certainty they will continue so, and even if they did, it would require a great multiplicity of suits at law, continuing for an indefinite number of years.

In tender consideration whereof, and inasmuch as complainants are remed'less at law, and can only have complete and full remidy in a court of equity, where matters of this sort is properly cognizable and relievable, to the end, therefore, that justice may be done in the premises and such decree be had as is just and equitable in the premises, and particularly that said defendants, their agents, confederates, and
29 servants be perpetually and forever enjoined from opening said bridge to the use of the public, either as a free bridge or a toll

bridge, or doing any other act in or about the matter whereby the franchises and privileges conferred by said contract may be injured or impaired; and if the road commissioners of the county of Floyd, who, by law, now represent the inferior court (abolished), should at any time be applied to open and establish roads thereto, they may be perpetually and forever enjoined according to the terms of their contract.

May it please your honor to grant unto complainants the State's most gracious writ of injunction restraining the defendants, under a penalty to be therein inserted, from opening or using said bridge for the public as a free bridge or toll bridge, till the further order of this court and the final hearing, and also the State's most gracious writ of subpœna directed to each of said defendants, Nagle, Smith, Adams, Cothran, to be and appear at the next superior court to be holden in and for said county, then and there to stand and abide by the order and decree of the court.

30 Complainants do not ask for defendants, answers' because they are fully able to prove the facts alledged.

WRIGHT & FEATHERSTON,
Pro Wright.
UNDERWOOD & ROWELL,
Pro A. Shorter.

Personally came before me A. R. Wright, who saith on oath that what is contained in this bill so far as relates to his own acts and deeds are true, and what relates to the acts and deeds of others, or purports to be derived from information, he believes to be true.

AUGUSTUS R. WRIGHT.

Sworn to and subscribed this 23rd Nov., 1872.

R. D. HARVEY,
Judge S. C. R. C.

Personally came Alfred Shorter, who says on oath that what is contained in this bill, so far as relates to his own acts and deeds, is true, and that what relates to the acts and deeds of others he believes to be true, as is derived from information believed to be true.

ALFRED SHORTER.

Sworn to and subscribed before me, this Nov. 23, 1872.

31 Ordered that the application for injunction be heard on this day two weeks at Wright & Featherston's law office, at 10 o'clock a.m., and that deponents be served with copies of this bill, unless waived by their attorneys ten days before the hearing.

Nov. 23, 1872.

R. D. HARVEY,
Judge S. C. R. C.

Exhibit No. 4.

GEORGIA,
Floyd County:

This indenture made this the 5th day of May, 1853, between H. V. M. Miller of the one part and Alfred Shorter of the other, witnesseth:

That the said Miller, for and in consideration of the sum of three thousand dollars to him in hand paid by said Shorter at and before the sealing and delivery of these presents, does grant, bargain, convey and relinquish privileges and purchases across the Etowah, Oostanaula and Coosa rivers at and near the city of Rome, in said county, which the

said Miller acquired by virtue of a contract and agreement made by and between him and the inferior court of said county at the July
32 term, 1851, of said county, together with all and singular the rights and privileges, duties and burdens incident thereto by virtue of said contract so made as aforesaid. To have and to hold unto said Shorter, his heirs and assigns, together with all and singular the appurtenances thereto belonging or appertaining to his or their own proper use and benefit and behoof forever in fee simple. And the said Miller for himself, his heirs, executors and administrators, the said bargained property unto the said Shorter, his heirs and assigns, will warrant and defend the title thereof against themselves only, the witness whereof the said Miller has hereunto set his hand and seal the day and year above written.

(Signed) H. V. M. MILLER. [L. S.]

Signed, sealed and delivered in presence of—
J. R. ALEXANDER.
W. T. TRAMMEL, *Not. Pub.*

Recorded by A. B. Ross, 5th January, 1853, in book H, page 596, No. 707.

Exhibit 3.

GEORGIA,
Floyd County:

This indenture, made this the 24th day of Sept., 1851, between
33 Homer V. M. Miller of the one part and Alfred Shorter of the other part, witnesseth:

That the said Homer V. M. Miller, for and in consideration of the sum of ten thousand dollars, to him in hand paid by said Shorter at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and relinquished, and doth by these presents grant, bargain, sell, and convey, and relinquish unto the said Alfred Shorter, his heirs and assigns, the following property, to wit: seven-tenths of all the bridge and ferry privileges and franchises which the said Shorter did, on the 7th day of June, 1851, convey to said Miller; also seven-tenths of the bridge structure across the Etowah River, at the foot of Broad street, in the city of Rome, in said county; also seven-tenths of all the bridge and ferry privileges and franchises across the Etowah, Oostanaula and Coosa rivers at the city of Rome, in said county of Floyd, which the said Miller acquired
34 by virtue of a contract and agreement made by and between him and the inferior court of Floyd County, at the July term, 1851, of said court, together with all and singular the rights and privileges, duties and burdens incident thereto by virtue of said contract so made as aforesaid; also, all the real estate lying in the city of Rome, and near to said city, conveyed by the said Shorter to the said Miller, on the 1st day of June, 1849, together with and singular the appurtenances there. to belonging. To have and to hold unto him, the said Alfred, his heirs and assigns, together with all and singular the rights, members, and appurtenances thereunto belonging, or in any wise appertaining, to his and their own proper use, benefit, and behoof, forever in fee-simple.

And the said Homer V. M. Miller, for himself, his heirs, executors, and administrators, the bargained property unto the said Alfred Shorter, his heirs and assigns, will warrant and forever defend the right and title thereof, against themselves and all persons claiming under them.

35 In witness whereof the said Homer V. M. Miller hath hereunto set his hand and seal the day and year above written.

(Signed) H. V. M. MILLER. [L. S.]

Signed, sealed and delivered in presence of—
JOHN R. ALEXANDER.
JAS. R. SMITH.

(Copy No. 2.)

GEORGIA,
Floyd County:

This indenture, made and entered into this the 14th May, 1862, between Alfred Shorter, of said State and county, of the one part, and Augustus R. Wright, of the same State and county, of the other part, witnesseth:

That the said Shorter, for and in consideration of the sum of twenty-five thousand dollars, to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained, sold and conveyed, and delivered, and by these presents does bargain, sell, convey and deliver unto Augustus R. Wright, his heirs, representatives and assigns, one-half interest in and to all my ferry and bridge privileges, franchises, and rights over the rivers in and about the city of Rome, and in the ferries and bridges them-
36 selves, together with one-half of all their members, appurtenances, fixtures and emoluments thereto being, belonging, or in anywise appertaining, in as full and perfect a manner as I myself hold, possess, or enjoy the same, to have and to hold the same to him and his heirs and assigns forever in fee simple. And the said bargained premises unto the said Wright, his heirs and assigns, the said Shorter, for himself and his representatives, shall and does warrant and defend against the claims of himself and his heirs only. In witness whereof I have hereunto set my hand and affixed my seal the day and year above written, each party retaining the right of free crossing to themselves, hirelings and servants.

(Signed) ALFRED SHORTER. [L. S.]

Signed, sealed, and delivered in the presence of us:
D. B. HAMILTON.
JOHN MCBRYDE,
Notary Public.

Recorded 14th August, 1862, in book N, page 29, No. 32.
A. B. ROSS, *Clerk.*

37 *Injunction bond.*

GEORGIA,
Floyd County:

Know all men by these presents, that we, Alfred Shorter and Augustus R. Wright, and Ebenezer Hillyer and Wm. A. Wright, their securities, are held and firmly bound unto G. W. Nagle, David Adams, Hines Smith, as trustee of his wife, and Hugh Cochran, their heirs and representatives, in the sum of ten thousand dollars, for the payment of which we bind ourselves, our heirs and representatives, jointly and firmly, by these presents.

The condition of the above bond is such that, whereas said Shorter and Wright have this day asked an injunction against said obligees restraining them from the use for the public of a certain bridge being constructed at the foot of Howard street, city of Rome, Ga.:

Now, if said Shorter and Wright shall pay all damages which may accrue and be assessed against them for the wrongful suing out of said injunction, then this bond to be void; otherwise to remain in full force and effect. Witness our hands and seals this 23 Nov., 1872.

AUGUSTUS R. WRIGHT. [L. S.]
ALFRED SHORTER. [L. S.]
38 E. HILLYER. [L. S.]
WM. A. WRIGHT. [L. S.]

We acknowledge due and legal service of this bill, and its orders, and waive further notice; also copies of bill & subpœnas and service by sh'ff, Nov. 25, 1872.

SMITH & BRANHAM,
Def'ts' Sol'rs.

ALFRED SHORTER AND AUGUSTUS R. WRIGHT
vs.
G. W. NAGLE, D. ADAMS, A. M. SMITH, TRUSTEE, and Hugh D. Cochran.
} Bill for injunction, &c.

The joint answer of the defendants' to the above bill.

The said defendants, now and at all times hereafter, reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' bill contained, for answer thereunto or unto so much and such parts thereof as these defendants are
39 advised is or are material for them to make answer unto, these defendants, answering, say:

It is admitted to be true that in the year 1851, and for some time previous, Alfred Shorter and others claimed to be the owners of exclusive ferry and bridge privileges over the Etowah and Oostanaula rivers, near their junction at Rome, Ga., both by prescription and by contract with the inferior court of Floyd County, upon the grounds stated and set forth in the bill filed by said parties, and recited in the opinion of the supreme court of Georgia, in the volume cited in complainants' bill, to wit, ninth volume Georgia Reports, page 517. That while said Shorter and others so claimed to be the owners of said exclusive ferry and bridge privileges, to wit, on the 5th day of March, 1850, an order was passed by the justices of the inferior court of said county appointing a committee of three "for the purpose of regulating a contract with (then) present owners and proprietors of the bridge and ferry at or near the junction of the Etowah and Oostanuala rivers"; that said committee reported a contract with said owners to the court on the 8th day of May, 1850, and that said report was accepted and
40 adopted by the court, and entered on the minutes of the court on the same day, to wit, May 8th, 1850; that from said report and order of court it appears that Alfred Shorter, H. V. M. Miller, and Lewis Tumlin were then the owners of said bridges and ferries, and that, upon the same considerations as there set forth in Exhibit No. 1 of complainants' bill, and for the same reasons therein stated, exclusive franchises or privileges, in the building of bridges and ferries, and in collecting tolls on and over the same were conferred, or attempted to be conferred, on the before last-mentioned parties, all of which will fully appear by a certified copy of said proceedings hereto attached, marked Exhibit A.

That on the 10th day of September, 1850, Job Rogers and others, twelve in number, citizens of said county, petitioned the inferior court to pass an order for the building and erection of free bridges across both the Etowah and Oostanaula rivers, at Rome, for the reason that public utility demanded it, and at the same time they prayed for the appointment of commissioners of receivers to open suitable roads to sites selected for such bridges. And on the same day orders
41 were passed appointing commissioners as prayed for, and appointing a committee for the purpose of obtaining a subscription for the erection of two free bridges, one across *of* each of said rivers, making said committee a building committee, authorized to contract for the erection of said free bridges upon the faith of such subscriptions as they might obtain, and without involving the court beyond the amount then already subscribed by the court, which, as appears from another order of said court, was only five hundred dollars.

That said committee on the 27th day of November, 1850, entered into a contract with Wm. R. Smith for the building of a bridge across the Etowah, near what was then and is now known as Smith's ferry; the said committee agreeing for the court to pay one-half the cost of said bridge, and in consideration thereof free passage over said bridge was secured to the citizens of said county for twenty years, and the said Smith also gave the right of way across said river and through his land, and rock from his quarry for the abutments of said bridge, and bound himself to pay one-half of the cost of said bridge, he, the said Smith, being
42 then entitled to charge toll to non-residents of said county; the parties agreeing to keep up said bridge at joint expense. All of which will fully appear by a certified copy of said proceedings, hereto attached, marked "Exhibit B."

Respondents further show, that all of said proceedings contained in Exhibit A and Exhibit B took place before any privilege or franchise was granted or attempted to be granted to said Miller, or any alleged contract was made with him alone, as claimed in Exhibit No. 1 to complainant's bill. And that all of said proceedings and orders were in esse, and stood upon the minutes of the inferior court unrevoked, and as of force when said suit referred to in complainant's bill was instituted, and when the same was finally adjudicated by the supreme court of this State, as reported in the 9th volume of Georgia Reports, page 517, and that that suit grew out of and was based upon the action of the parties in building a bridge under the charter and contract as set forth in Exhibit B. And that the complainants in said suit were the parties whose names are contained in Exhibit A to this answer, to wit: Alfred Shorter, H. V. M. Miller, and Lewis Tumlin; and if they had
43 any exclusive rights under Exhibit A to this answer, they should have then asserted them, and probably did then do so, and if they did not then assert them, they are concluded by the decision before referred to, which was adverse to them. And they nor their assigns cannot now, after the cause is finally adjudicated, and after all questions which were made or could have been made by their former suit, have been determined, seek, or have a second injunction or suit upon an alledged second contract or charter which was adroitly and designedly made and obtained by—not in the names of the real and true parties, i. e., the parties to the former suit, but in the name of one only of said parties, to wit, H. V. M. Miller, though made really and truly for the benefit and advantage of the parties to the former action or suit which has already been decided; especially when the present alledged charter or contract as set forth in Exhibit No. 1 of complainant's bill is in every

material respect substantially the same as the former one set forth in Exhibit A to this answer.

The suit in that case was against citizens of Floyd County
44 and the justices thereof; and in this case against the citizens of said county and the commissioners of roads and revenues of said county, who are now clothed with the jurisdiction of this subject, then vested in said inferior court.

The bridge across the Etowah was finally built under the contract set forth in Exhibit B to this answer by said Smith, and the court as agreed upon. And the recitals in Exhibit No. 1 to complainant's bill, to the effect that the committee were unable to collect the subscriptions made by the citizens of the county, and that they needed relief, are not founded in fact, and at the time said recitals were made were wholly immaterial and of no consequence whatever, so far as they relate to said Etowah bridge because by the contract as made with said Wm. R. Smith the inferior court of said county was bound for one-half of the cost of said bridge and said Smith for the other half, as will appear from Exhibit B, and both the county and said Smith were amply able to pay for the same; so there was no difficulty whatever in the erection of said
45 bridge, and no probability of a failure to build it; and no contract had ever been made by said court for the building of a bridge across the Oostanaula. Respondents agree that both parties may use the case referred in the 9th volume of Georgia Reports, page 517, as an exhibit to complainant's bill without attaching a copy thereof to said bill; and they refer the court to that case for what is therein decided.

Respondents do not know whether the propositions made to the said H. V. M. Miller, "as one of said bridge company," was made "in view of said decision and with express reference to it" or not, so far as the court was concerned. Perhaps said Miller and said company whom he represented, as stated in the bill, had said decision in mind when said propositions were drawn. Respondents admit that Exhibit No. 1 to complainant's bill is a correct copy, as far as it goes, from the minutes of the inferior court, except that the same is incomplete, inasmuch as it was accompanied with the protest of Wm. Johnson, one of the
46 court, which was made and entered on the minutes at the time said proceedings were had; a certified copy of which is hereto attached, marked Exhibit C, which respondents make a part of their answer.

Respondents also admit that said Shorter afterwards purchased such property and interest as said Miller was entitled to under said proceedings, and that the said bridge across the Oostanaula River was built after said proceedings were had, though the bridge across the Etowah was built long before. That said bridges were burned during the late war and have been since rebuilt, and that during the interim and after the war, flats were put in the rivers and used as stated for toll until the bridges were rebuilt. That the said Shorter proposed of his own accord, and before proceedings were had as contained in Exhibit No. 1 of complainant's bill, to move the bridge on Oostanaula River to the foot of Court-House street, as will appear from Exhibit A to this answer, and that there had been before a bridge at said place. That all that
47 was done by said complainants and their predecessors, in reference to said alledged contract and charter, and which purports to be the consideration thereof, was for their own good and advantage, and not for the county of Floyd or the citizens thereof. On the contrary it was and is to the positive disadvantage and injury of said county and the public. For its design and effect was and has been to

prevent the erection of a sufficient number of free or toll bridges required for accommodation and use of the public.

Complainants are informed and believe that said Shorter had a bridge in process of construction, though not complete, over the Oostanaula, near the junction of the two rivers, which was afterwards abandoned when the upper bridge over that river was built. What the value thereof respondents cannot positively say, though they have no idea that the amount expended on it would exceed four thousand dollars. Neither of the bridges now standing are worth more than ten thoasand dollars; at least, a better bridge than either of them can be now
48 built for that sum. Respondents are informed that said Shorter, after his suit against Smith and others was decided against him, made a compromise with said Smith for his own advantage, upon certain terms which are not now definitely remembered, but the same can be proven, by which he was let into the joint ownership of said bridge erected by said Smith and the court, and by which certain rights and privileges were guaranteed to said Smith. Said bridge was afterwards destroyed by flood, as stated. Whether another effort to rebuild it was made respondents do not know. It is conceded that said Smith's contract with the court has expired or become extinct from no use. But how much said Shorter lost by his connection with and ownership of a part of that bridge, if anything, respondents do not know. Whatever his loss was, if any, the enterprise was one of his own selection and anxiously desired, voluntarily assumed, without solicitation from any one by him.

Respondents do not know whether said complainants and their
49 predecessors have fully complied with their alleged contract or not. They have no means of knowing this, and it is for them to show it to the court. Doubtless the said alleged contract and charter, as set forth in Exhibit No. 1 to the bill, which was and is so disadvantageous to the county and the public generally, was obtained by a threatened appeal from the decision of the supreme court of Georgia to the Supreme Court of the United States, and by other means and persuasions, for if the court had been let alone to act upon their own volition, no such alleged contract or charter would ever have been entered into or granted, and it was only by the most strenous efforts, as respondents are informed, on the part of said bridge company and of said Miller that the same was obtained.

Complainants admit that said Augustus R. Wright purchased of said Shorter a half interest in said property at what price they do not know; but they are informed and believe that he paid for the same in Confederate money. It is doubtless true as stated, that after the war complainants were notified to rebuild said bridges, though the same was
50 not done until the summer of 1866. The demand for passage across the rivers was then too great to be supplied by flats, besides the danger attending such passage was great. The bridges built after the war are wide enough to admit of the passage of vehicles, though they are barely so and are cramped, and vehicles are liable to lock in passing each other.

If said alledged franchises have ever since the year 1857 been reorganized and recognized by the inferior court or the road commissioners, respondents are not aware of it. On the contrary, they say nothing material in this respect has ever been done by either of said courts. Respondents admit that on the 2nd day of February, 1872, T. T. Wright, of Fulton County, Georgia, purchased of one Francis Skinner, of the city of Baltimore, the property referred to in complainant's bill, to wit,

"A certain tract of land in the county of Floyd, in the State of Georgia, opposite the town of Rome and on the Etowah River, known as the Long farm, containing (362) three hundred and sixty-two acres, more or less, being the estate conveyed by E. B. Long to said Skinner, dated March 25th, 1867, and recorded in the clerk's office of the superior
51 court of Floyd County, book P of deeds, pages 1 and 2; reference to which (and the prior conveyances therein mentioned), for a more particular description of the granted premises, was then *and then* and therein made.

That on the 17th day of February, 1872, the said T. T. Wright conveyed by deed to Alfred Shorter, one of said complainants, one undivided fourth interest in said property; and unto David Adams, his heirs and assignees, one undivided eleven-thirtieths interest in said property; and unto Hines M. Smith, trustee, one undivided two-fifteenths interest in said property, reserving to himself one undivided fourth interest in said property, as will appear by a copy of his deed hereto attached, marked D. That subsequently, to wit, on the day of , 1872, said T. T. Wright conveyed his remaining interest in said property to James H. Wright, and that James H. Wright conveyed it to H. D. Cothran, David Adams, and G. W. Nagle, as will fully appear by copies of his deeds hereto attached, marked Exhibit E. And that on the day of , 1872, said Alfred Shorter made his deed to H. D. Cothran, purporting to convey his undivided fourth interest
52 in said land to him, a copy of which is hereunto attached, marked F. And that subsequently by agreement between the parties, rating said land at fifteen thousand dollars, said H. D. Cothran became the owner of an interest therein equal to $7,500, and the said Adams of an interest therein equal to $3,500, and the said Nagle and Smith, as trustees, each of an interest therein equal to $2,000.

Respondents further say that when said Shorter purchased his interest therein and became a joint owner he agreed with the balance of said purchasers to offer no obstruction whatever to the erection of a bridge from some suitable point in Rome, Ga., across said Etowah River to said land, and that before he sold his said interest in said lands to said Cothran said bridge was in process of construction and more than two-thirds of the work thereon had been done, and that it was expected by the company and so understood that he would pay his proportion of the cost of said bridge. Subsequently, to wit, on the 25th day of September, 1872, and on the 1st day of October, 1872, before the building of said bridge was begun, said Wright, Smith, as trustees, Adams,
53 and Shorter purchased the land lying at the end of Howard street, in Rome, Georgia, from John D. Green, trustee, and from John R. Freeman, as will fully appear by copies of said deeds hereto attached, marked G and H, and that the abutment of the bridge, built by respondents in said city, now stands exclusively on said land.

That said Shorter and Wright, in their deeds hereinbefore referred to, conveyed said land at foot of said street with the other property therein conveyed, so that respondents are now the owners of said lands on both banks of said river, and on which said bridge is now erected, and between which said stream now runs.

That said street was opened from what was its terminus two years ago, to wit, the Rome Railroad tract, to the land now at the foot thereof and owned by respondents, by said Green and Freeman, and through their property, and not on the motion of the city or at the instance of any one representing the public, and that they reserved that portion sold

to respondents to themselves, enclosed it at the time of opening said street, and kept it so enclosed until the same was sold to respondents by them.

54 That said bridge leads to the center of said Long farm, is exclusively located on respondent's lands, and is the only accessable approach to said farm. That the route by the bridge of complainant's is circuitous, over hills and over Silver Creek, and is two miles away from the main body of said land, whereas by the bridge of respondents the route is easy, level, unobstructed, and does not exceed three hundred yards to the center thereof. It is true respondents have laid off a portion of said land into lots and propose selling the same, and expect to realize a profit thereon, but it is not true that the respondents built said bridge solely for their own profit and advantage. The condition of trade and travel in said county, the conformation of the country, public necessity, and the interest of the people of the county and of the city of Rome requires this approach and outlet. The distances between Spring Creek towards Cartersville, Cedar Town, Cave Spring, Van Wert and Rome are materially lessened, and the roads to Rome

55 by said bridge are level, whereas by complainant's bridge they are circuitous and hilly, from one to two miles longer, and difficult of approach.

Respondents further say that before the completion of said bridge, and before said bill was filed, they had prepared a petition to the commissioners of roads and revenue, of Floyd County, who are now by law vested with the exclusive jurisdiction over the subject, for the opening of said bridge to the public, and the establishment of the same as a public bridge, and with the prayer that said commissioners adopt certain streets on respondent's property as a highway, and hereafter lay out, as prescribed by law, other highways leading to the same for the benefit and advantage of the public, fixing such rates of toll as will simply pay the interest on the investment, or cost of the bridge, and as will keep the same in repair. And that said application was made to said commissioners in pursuance of such instructions at the December term, 1872, and the prayer of respondents was granted, all of

56 which will fully appear, as well as the reasons therefor, from a copy of said petition and order hereunto attached, marked I, which is made a part of this answer.

Respondents further show that on the day of , 1872, while said Shorter was a member of said company, then known as the South Rome Town Company, now as the East Rome Town Company, respondents gave to said complainant, A. R. Wright, written notice of their intention and purpose to erect said bridge, and requested him to make known his objections to the same if any he had, a copy of which is hereunto attached, marked K. To which said notice said Wright made no reply, either verbal or written, and suffered respondents to proceed with the work until said bridge was near completion before he filed his said bill. Respondents submit that it is now too late for him to enjoin its use, either as a public or private bridge, he having allowed the building thereof, and having waived his suit until respondents had expended about seven thousand dollars on said bridge, and until the same

57 was within a few days of completion, the same having been completed within five days after said bill was filed. And the said Shorter cannot enjoin the use of said bridge for either of said purposes, he being one of said company when said notice was given, and acting with it, in the giving thereof. The said bridge does not consist of two wooden spans alone, but is a first-class truss bridge, built in the

best manner, and with the best of material, wood and iron, and cost, with the approaches, between eight and nine thousand dollars, and is really worth more to-day than either of complainant's bridges, with their stone piers.

No member of said company, while said Shorter was one thereof, ever expected, understood, or ageed, nor did they, or either of them, ever have any notice that they were or would be enjoined, or expected to pay said complainants, or either of them, for the privilege of building said bridge. On the contrary it was understood that they would be allowed, so far as Shorter was concerned, to proceed to execute their purpose, in this respect, without let or hindrance. It is admitted that the bridge built by respondents is within three miles of the junction
58 of the Etowah and Oostanaula Rivers. Respondents deny that they are responsible for any damages complainants may sustain. Collectively, they are worth over one hundred thousand dollars, and are amply able to pay any damage complainants may sustain, but they submit to the jurisdiction of the court, without demurrer to complainants' bill, that their rights and the rights of the public may be adjudicated and determined.

Respondents deny that said complainants have any exclusive rights whatever to erect a bridge or bridges, as claimed, and to charge and collect toll thereon. Because, they say that said inferior court, if they granted any such right, had no authority to do so, and such grant is void, and if they did have such authority by law it was limited to fourteen years by the statutes of Georgia, and now by the code of Georgia to twenty years; and such franchise or contract as claimed, if ever valid and binding, has expired by law and is now extinct. And if said complainants claim under a contract with said inferior court, said court
59 exceeded its authority in making such a contract, and if any one is liable, said justices as individuals, or the county of Floyd, is liable for the breach thereof, and no remedy can be had against respondents by injunction or otherwise. And that when said alledged charter was granted or said to have been granted, to wit, in 1851, said justices of the inferior court, sitting for county purposes, had no authority to incorporate any company for any purpose whatever, and that said justices had authority to incorporate only when sitting as a civil court for the trial of civil causes, as provided by the constitution of the State. That as a quasi corporation sitting for county purposes, they were only authorized to license and open to public use and to discontinue bridges, ferries, and roads, and not to incorporate or grant exclusive privileges to any company, and while sitting as a civil court, under the constitution, they were bound to incorporate any company that complied with the law authorizing incorporation, and could not therefore exercise any authority or grant any exclusive privilege to any company or person, that would abridge their power or the power of succeeding courts.
60 That said court was invested with no legislative or quasi legislative authority or power whatever; but that, since the constitution of this State was amended in 1856, so that the general assembly of Georgia debarred themselves from incorporating bridges and certain other companies, said court and its successors, and now the commissioners of roads and revenues of Floyd County, are vested with legislative or quasi legislative powers and exclusive powers on this subject, and therefore the incorporation of respondents' company, or the order making said bridge and streets public, has all the authority, sanction, and effect of an act of the legislature of this State, and cannot be in-

terfered with by the unauthorized and void act of any public functionary of this State.

Respondent further shows that the building of their bridge and its use, either as a private or public bridge, in no interferes with the actual or physical use of complainants' bridge by them, or with their collection of tolls over the same, and that the public good and the interest of the people of the city of Rome is greatly subserved and
61 accommodated by the act of the commissioners, in making the respondents' bridge a public bridge, and in opening suitable highways to the same.

Respondents further answering, say, and so do said commissioners, by their attorneys, that said injunction cannot issue against said commissioners, or operate on them, for that injunction can only issue against the parties, and not against a court having jurisdiction over the subject-matter.

Respondents further say that they are authorized by law, without any action or order from said commissioners, to use said bridge for themselves, and so are their assigns, who may become joint owners in said lands and bridge, and streets, or in any part thereof, and of this they ask the judgment of the court.

Respondents further say, that no petition for incorporation was ever filed, or prayed, as provided by law, and that the proceedings in reference thereto, as stated in the bill, were unauthorized by law, irregular, illegal and void, and that no bond was ever given, as by the statute in such cases made and provided; that said alledged charter or con-
62 tract purports to have been tendered by the court to said Miller, when, in truth and in fact, it was drawn by the original company's agent, and concocted by them, and by unfair means procured by them, to be tendered to said Miller in the form in which it appears; that the whole of said proceedings set out in complainants' bill was the work of said original company, and not of the court; that it was all done, not at a regular term of said court, but at a called session; and respondents have reason to believe, and so charge, that it was not done when said court was in session, either at a regular or adjourned term, but when said justices were acting as individuals, and not as a court, and is, therefore, void.

Respondents further say, that the bridge built by respondents is a public necessity; that said complainants have refused to erect any bridge other than those they now own; and that said commissioners having determined said bridge to be a public necessity, respondents now, as they have heretofore done, tender the same to said complainants, and offer to convey to them all their right and title to the
63 same upon condition only that they refund to respondents its actual cost, open said bridge to the public, and grant to respondents and their assigns, their agents and servants who may settle on said land, free passage to their homes; that said lands, so soon as the same can be done by the general assembly, will be placed within the corporate limits of the city of Rome, and the convenience of the public, aside from the interest of respondents, renders this, at least, a necessity.

Respondents further say, that no consideration whatever was paid to the said inferior court or any one for any privilege of erecting a bridge or bridges across the Etowah River; that after said case of Smith against Shorter et al., contained in the Georgia Reports, was decided, said company compromised with said Smith and the court, and become half-owner in the bridge built by said Smith; that they paid but

a small sum for that half interest, and that they received in becoming half-owners in said bridge the full value of all the money they paid for the same; that the Etowah Bridge was standing and intact when said alledged contract, as set forth in Exhibit No. 1 to com-
64 plainant's bill, is said to have been made, and nothing whatever was done or paid by said company as a consideration for any exclusive right over said Etowah River after said charter was granted, or at the time; that all bridge property said company then owned they had owned and erected beforehand, and nothing was done except to rebuild Etowah Bridge after the war, as herein stated.

And these respondents, further answering, shew, that in the year 1855, Melinda Hargrove and other heirs at law of Z. B. Hargrove, deceased, brought their suit in equity in Floyd superior court against Alfred Shorter, whereby they set up a claim to said bridge property and franchises, viz, two ferry landings, with exclusive bridge privileges at the head of Coosa River, the same being the property in dispute, and that Augustus R. Wright was attorney-at-law for said complainants. and that said cause came on to be heard at the July term, 1860 of said court, when the jury returned the following verdict: "We, the jury, find for the complainants all the land and the ferry and bridge privileges as claimed in their bill, with the income
65 of said bridges, estimated at $25,000, with cost of suit. Stephen M. Wilson, foreman." That said Shorter moved for a new trial in said case, which was refused by the court below, and said cause was by him taken by writ of error to the supreme court of Georgia; and after several continuances and other entries made in said case by that court, the cause was finally dismissed at the March term, 1863, by which the said judgment of the court below was affirmed, and by which final judgment respondents alledge that any charter or franchise which complainants in this bill had in said bridge or ferry property prior to that time were rendered null and void, and of no effect.

And they further show that in the year 1862 the said Alfred Shorter paid off and discharged said verdict and judgment, and executed the decree of court by transferring to said A. R. Wright one-half interest in said bridges and whatever of franchise he had in them, and he, said Wright, settled with said heirs and paid them their part of said verdict in Confederate money, and these complainants are informed and
66 believe; and they pray reference to a certified copy of all the proceedings in said suit, said copy taken from the records of said supreme court, the papers and records in the court below having been lost or destroyed.

And these defendants having fully answered, pray to be hence discharged with their reasonable cost, &c.

SMITH & BRANHAM,
Respondents' Solicitors.

GEORGIA,
Floyd County:

You, H. D. Cothran, Hines M. Smith as trustee, David Adams, and G. W. Nagle, do solemnly swear that what is contained in your foregoing answer, so far as the same relates to your own act or deed, is true of your own knowledge, and that what relates to the act or deed of any

other person, and so far as the same is derived from information, you believe the same to be true.

HUGH D. COTHRAN.
HINES M. SMITH,
Trustee.
DAVID ADAMS.
G. W. NAGLE.

Sworn to and subscribed before me this Dec. 9th, 1872.
CHAS. H. SMITH,
Notary Public.

67 *Exhibit A.*

Ordered by the court, that James M. Spurlock, William T. Price, and F. I. Sullivan are hereby appointed a committee for the purpose of negotiating a contract with the present owners and proprietors of the bridge and ferry at or near the junction of the Oostanaula and Etowah rivers. The object of the contract is to secure certain privileges for the people of the county by granting unto them certain rights and privileges. This committee are hereby authorized to make and fully arrange with said proprietors said contract, which shall be binding and put upon the minutes of court whenever approved of by a majority of the same, and shall be entered on record at any called court for that purpose, etc.

Ordered by the court, that Larkin Barnett, Benjamin Garrett, and Charles Knowls be and are hereby appointed reviewers to make and lay out the road according to the within petition, and report accordingly.

March 5th, 1850.

W. T. PRICE, *J. I. C.*
F. I. SULLIVAN, *J. I. C.*
DENNIS HILLS, *J. I. C.*

Recorded May 6th, 1850.

MAY 8TH, 1850.

Inferior court met for county purposes. Present, their honors
68 Dennis Hills, Wm. T. Price, F. I. Sullivan, J. M. Spurlock, and William Johnson, justices.

The committee to make a contract with the owners and present proprietors of the bridge and ferries across the Oostanaula and Etowah rivers in the city of Rome, beg leave to report the following order, and embodying the terms of the contract between the parties, and recommend its adoption.

WM. T. PRICE.
F. I. SULLIVAN.

It appearing to the court that heretofore, to wit, on the 26th day of May, 1834, R. D. Mitchell, P. W. Hemphill, Z. B. Hargrove, and William Smith, the owners and proprietors of the lot of land on which the town of Rome is now situated, and the owners of the bridge and ferry privileges on the Oostanaula and Etowah rivers, at or near the said town of Rome, submitted to the inferior court of Floyd County the following propositions, to wit:

GEORGIA,
Floyd County:

We, the undersigned, propose to the people of Floyd County and the inferior court, as a consideration for the removal and permanent location

of the public buildings of said county to the head of the Coosa
69 upon lot of land No. 245, in 23rd district and 3rd section of said county, the following terms, to wit:

1st. We propose to give to the inferior court for the use of Floyd County one-half of the proceeds of the sales of the town lots on said lot of land, and that suitable lots be selected thereon by the court and the undersigned jointly for court-house, jail, academy, and three churches to be erected on.

2nd. We propose to pay the citizens of the town of Livingston the actual value of all their improvements made in said town—and the improvements to belong to us—the value of the improvements to be appraised by three disinterested and respectable citizens. The payment to be made out of the first proceeds of the sale of town lots at the head of the Coosa realized by us.

3rd. We propose to keep a free ferry at the head of the Coosa for the benefit of the free passage of the citizens of Floyd County upon foot and on horseback, except persons passing and repassing to their farms.

4th. The sale of the town lots at the head of the Coosa, together with the collection and equal division of the proceeds of said lots between the court and the undersigned, are to be under the joint manage-
70 ment and control of the court and the undersigned; and it further appearing to the court that said proposition was submitted to and approved by a large majority of the citizens of the county, the same was accepted, and on the third Saturday in June, 1834, the following order was passed and entered on the minutes of the court:

MAY 8TH, 1850.

Philip W. Hemphill, Daniel R. Mitchell, William Smith, Zachariah B. Hargrove, having made propositions to the inferior court of Floyd County for the removal of the county site from Livingston to the head of Coosa, upon lot No. 245, in the 23rd district and 3rd section, which proposition was submitted to the people of said county of Floyd for their acceptance or rejection, and a considerable majority of the people of said county having voted in favor of the acceptance of said proposition and the removal of the county site from Livingston to the head of Coosa: Whereupon it is ordered by the inferior court that proposition be accepted and placed upon the minutes of the inferior court of Floyd County.

And it further appearing to the court that the propositions made as aforesaid and accepted have been adhered to and observed by the
71 persons making the same; that they have paid over to the use and for the benefit of Floyd County one-half of the proceeds of the sale of the town lots and conveyed by deed to the said court one-half of the lots unsold, and have also transported across the rivers Oostanaula and Etowah, in ferry-boats and upon bridges, the citizens of said county of Floyd, on foot and on horseback, free of toll, during all the time they were the owners and proprietors of the bridge and ferry privileges on said rivers, and that their assignees have kept, observed, performed the same in good faith and to the great convenience, accommodation, and benefit of the people of said county;

And it further appearing to the court that Alfred Shorter, H. V. M. Miller, and Lewis Tumlin, the present owners and proprietors of said bridge and ferry privileges, propose to erect a bridge across the Oostanaula at the foot of the street leading from the court-house north, it being the same place at which the former bridge upon the Oostanaula was located, and to reduce the rate of its tolls upon said bridge when

erected, and also upon their bridge across the Etowah River for the citizens of the county, to the following rates, to wit:

Oats and fodder, 4 horse wagon, 20 c. per load; 2 horses, 10 cts.
Corn in ear, 4 " " 30 " " " 2 " 15 "
72 Lumber, 4 horse wagon, 30 cts. per load; 2 horses, per load, 20 cts.
Wood, 4 " " 25 " " 2 " " 15 "
Potatoes, 4 " " 20 " " 2 " " 10 "
Shingles, 4 " " 30 " " 2 " " 15 "
Brick, 4 " " 20 " " 2 " " 10 "
Buggy and horse, 20 "
2 horse carriage, 30 "

Beef, poultry, vegetables, and such like articles, one horse wagon, 10 cents; two horse, 20 cents.

Going to and returning from church on Sundays, general elections, and to general musters for militia men free at all times on such occasions.

And that said company have erected and now have in use a safe and convenient bridge across the Etowah River where Broad street, of the city of Rome, crosses said river. Now, in consideration of the beforementioned proposition and acceptance of the removal of the county site from Livingston to the head of the Coosa, the payment of one-half of the proceeds of the sale of the town lots to the inferior court for the use of the county, the conveyance of one-half the unsold lots to the inferior court for the use of the county, the donation of lots for the court-house, jail, academy, and churches, the free ferriage heretofore of the citizens of the county on foot and on horseback, and guarantee by the
73 present owners and proprietors that the same rights and privileges shall be continued to the citizens of the county on foot and on horseback hereafter across their bridges; the erection of the bridge across the Oostanaula at the place hereinbefore mentioned, and the reduction of the rates of toll as before mentioned:

It is agreed and ordered by the court that the franchise and the privilege of opening ferries, building bridges, receiving and collecting toll at the same upon the Oostanaula and Etowah rivers, at or near the city of Rome, in the county of Floyd, be, and the same is hereby, confirmed unto Alfred Shorter, H. V. M. Miller and Lewis Tomlin, their heirs and assigns forever, and that the said franchise be vested in them exclusively, and that all orders and agreements made or privileges granted to any other person or persons, or to any body corporate, which militates against this order, or which will lessen or abridge the exclusive right and privilege hereby granted and vested in and confirmed unto said Shorter, Miller and Tumlin, as far as by law we are authorized to annull the same and transfer it to others.

It is further agreed and ordered by the court that the *the* power vested in this court by law to lay out and open new roads shall not be used in such way as in any degree to curtail or abridge or injure the
74 franchise hereby confirmed and vested exclusively in said Shorter, Miller and Tumlin, and their assigns, nor shall the town commissioners permit any other property in the city of Rome in which this court is interested as part owner, sole proprietor, or subject to their control, to be used by them or be permitted to be used by others in such a way as to injure or lessen the value of the franchise hereby conferred and granted as aforesaid. And it is further ordered by the court that the location of the bridge across the Etowah, where Broad street crosses said river, be adopted, sanctioned and recognized by this court, and that this order be entered on the minutes.

Exhibit B.

GEORGIA,
Floyd County:

We, whose names are hereunto assigned, would respectfully petition the honorable inferior court to pass an order, and let out contracts for the purpose of building free bridges and cross the Etowah River at the point near Rock Bluff as may be selected by the court, and the revisioners to examine and mark out a road from the same, inter-
75 secting the Vanns Valley road at or near Jonas King's house; also, for a bridge across the Oostanaula River at a suitable point for the use of the said bridges; and would further petition said court that they proceed immediately to take steps the most expedient for having said bridge built, and that public utility demands it, and as such your petitioners will ever pray.

Job Rogers.	Thos. C. Hacket.	Daniel S. Printup.
W. W. Burch.	Jno. H. Lumpkin.	H. Cooley.
J. P. Perkins.	Larkin Barrett.	A. T. Harden.
W. B. Jones.	Shaderick Morris.	Jno. W. Sanders.

It is ordered that S. Morris, H. Cooley, and Chesley Attaway be, and they are hereby, appointed commissioners to review and mark out the road as petitioned for in said petition.

September 10, 1850.

W. JOHNSON, *J. I. C.*
J. M. SPULLOCK, *J. I. C.*
WM. T. PRICE, *J. I. C.*

According to the p'ayer of the p'titioners it is ordered by the court that Job Rogers, Daniel S. Printup, A. T. Harden, Daniel R. Mitchell and John H. Lumpkin are hereby appointed a committee for
76 the purpose of waiting on the public generally and obtaining subscriptions for the erection of two free bridges, one across the Oostanaula, for the free passage of the public generally, and the other at the point given by W. R. Smith, on the Etowah River, to the court of Floyd, and free passage to the citizens of said county; and it is further ordered that said committee be appointed a building committee for the purpose of contracting for the building bridges as aforesaid.

That said committee, in making a contract for the object above mentioned, will make the same upon the faith of said subscriptions, with due regard in not involving the court in any responsibility beyond and except the amount already subscribed by said court, and that said court, for the benefit of the county of Floyd, reserving all the right and control for the regulating the same.

And it is further ordered, in order more effectually to carry out the object aforementioned, that in the event that any of said committee should fail or refuse to act, then the remaining portion of said committee is hereby authorized to fill such vacancy by appointment of any other suitable person or persons.

77 GEORGIA,
Floyd County:

This article of agreement made and entered into this 27th day of November, 1850, between Dennis Hills, William T. Price, Francis I. Sullivan, William Johnson, and James M. Spullock, justices of the inferior court of said county and State aforesaid, by their committee appointed the 10th day of September, 1850, Job Rogers, A. T. Harden, Daniel S. Printup, John H. Lumpkin, and Daniel R. Mitchell, have this day en-

tered into a contract with William R. Smith, of said county and State aforesaid, witnesseth, that said committee on their part for said county agree to pay one-half the cost of a bridge to be constructed over the Etowah River at any point within one hundred feet above the present ferry, on said river, known as Smith's ferry, and that for the consideration of said amount to be paid by said committee for the county aforesaid, free passage is hereby secured to the citizens of said county for the term of twenty years, and so long as the said bridge shall remain, and the said William R. Smith on his part agrees to give the right of way across said river and through his lands for the term of twenty years to said committee for said county as aforesaid for the purpose of erecting
78 said bridge above named, and the right through his premises. And further, to give to the said committee the rock for the abutments, to be quarried out of the side of the hill where the road will run from said bridge into Rome; they, the said committee, quarrying the same, and, if necessary, the rock lying about where said bridge is built can be used for said purposes; and the said William R. Smith further agrees and binds himself, his heirs, executors, administrators and assigns, to pay, or cause to be paid, to the contractors, whomsoever they may be, for the building and constructing said bridge one-half the cost for building the same. And the said inferior court does hereby grant and secure to the said William R. Smith the right of charging toll on said bridge from persons living out of the limits of said county of Floyd, in a proportionable manner to be agreed on hereafter, and the said William R. Smith hereby authorizes said committee to contract for the building the same upon the terms hereinbefore mentioned, and the repairs necessary to be made to keep up the bridge in good condition are to be made at the joint and equal expense of said inferior court and said William R. Smith.

79 In witness whereof the parties have respect*fully* put their hands and seal this the 27th day of November, 1850.

W. R. SMITH. [SEAL.]
WM. JOHNSON, *J. I. C.* [SEAL.]
F. I. SULLIVAN, *J. I. C.* [SEAL.]
J. M. SPULLOCK, *J. I. C.* [SEAL.]
By WM. JOHNSON, *Authorized.*

Witness:
JNO. R. ALEXANDER.
W. C. HENDRICKS.

Recorded 29th Nov., 1850.

JESSE LAMBERTH, *Clerk.*

Exhibit C.—Protest for following reasons.

ROME, GA., *October* 14, 1851.

Wm. Johnson, one of the justices of the inferior court of the county of Floyd and State of Georgia, do hereby protest and do enter the same as by solemn protest against the action of said inferior court respecting the bridge charter to H. V. M. Miller:

1st. Because the time extended to said company is unreasonable.

2nd. Because it is depriving the citizens of their rights secured to them under said charter, ensuing to the injury of those whose interest is affected by the postponement and unreasonableness of the time
80 given. For the foregoing reasons and various others too tedious to mention, I hereby enter my name as a dissenter to said action.

WM. JOHNSON, *J. I. C.*

Exhibit D.

GEORGIA,
Fulton County:

Know all men by these presents, that I, Thomas T. Wright, of the county of Fulton, State of Georgia, in consideration of thirty-seven hundred and fifty dollars, paid by Alfred Shorter, of said county and State, the receipt whereof is hereby acknowledged, and in further consideration of five thousand five hundred dollars paid by David Adams, the receipt whereof is hereby acknowledged, and in further consideration of two thousand dollars paid by Hines M. Smith, trustee, the receipt whereof is hereby *is hereby* acknowledged, do hereby remise, release, and forever quitclaim unto the said Alfred Shorter, his heirs and assigns, one undivided fourth (¼) interest in the property hereinafter described; and to the said David Adams, his heirs and assigns, one undivided eleven-thirtieths (11-30) interest in the property hereinafter described, and unto the said Hines M. Smith, as trustee, and his successors in office,
81 one undivided two-fifteenths (2-15) interest in the property hereinafter described, to wit: A certain tract of land in the county of Floyd, in the State of Georgia, opposite the town of Rome, and on the Etowah River, known as the "Long farm," containing three hundred and sixty-two acres (362) more or less, being the same estate conveyed to me by deed of Francis Skinner, dated the second (2) day of February, A. D. 1872, and conveyed by the deed of Jno. S. Barry to the said Skinner, dated February 28th, A. D. 1870, and recorded in the clerk's office of the superior court of the county of Floyd, and State of Georgia, in book R of deeds, pages 315, 316, and 317, ¶ 260; reference to which and to prior conveyances therein mentioned or referred to is hereby made for a more particular description of the granted premises.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said Alfred Shorter, David Adams and Hines M. Smith, as trustee, respectively to all and each of them, as herein before conveyed, to their own use and behoof forever. And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantees, and their heirs and assigns
82 that the granted premises are free from all encumbrence made or suffered by me; and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantees and their heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me, but against none other.

In testimony whereof I have hereunto set my hand and affixed my seal this the seventeenth day of February, in the year of our Lord eighteen hundred and seventy-two.

THOMAS T. WRIGHT. [L. S.]

Signed, sealed, and delivered in the presence of—
J. BRANHAM, Jr.,
CHAS. H. SMITH,
Not'y Pub.

Exhibit E.

STATE OF GEORGIA,
Floyd County:

This indenture, made this the 29th day of October, in the year eighteen hundred and seventy-two, between James H. Wright, of New Orleans, Louisiana, by his attorney in fact, Thomas T. Wright, of the first part,

and Hugh D. Cothran, of Floyd County, Georgia, of the second part, witnesses:

That said James H. Wright, in consideration of the sum of one
83 thousand dollars, the receipt whereof is hereby acknowledged, does hereby convey unto said Hugh D. Cothran, his heirs and assigns, the following real estate, to wit: One undivided sixteenth interest in and to that tract or settlement of land known as the Long Farm property, adjacent to the city of Rome, inclusive of the ground acquired by exchange with J. J. Cohen, and inclusive also of the same acquired interest in the bridge now being built across the Etowah River, and the small parcel of land near the southwest abutment of said bridge. The said Long Farm property comprising the major portion of lots of land numbers two hundred and eighty-five (285) and two hundred and eighty-six (286), and a portion (say thirty acres more or less) of lot two hundred and seventy-six (276), lying next the river. Also the small fraction of two hundred and eighty-seven (287) on the west side of the same. All lying in the twenty-third district and third section of originally Cherokee, now Floy County, Georgia, and containing 350 acres more or less, and this deed conveying one-sixteenth interest thereof.

To have and to hold the said bargained premises to himself, his heirs and assigns, forever, in fee simple, and the said James H. Wright, his heirs, executors and administrators, the said bargained premises
84 will warrant and forever defend the right and title thereof against the claim of all persons, and warrant the same free from encumbrance, as witness his hand and seal.

JAMES H. WRIGHT, [SEAL.]
By THOMAS T. WRIGHT,
Attorney in Fact.

I join in the above conveyance.

THOMAS T. WRIGHT. [SEAL.]

Signed, sealed, and delivered in our presence:
R. J. GWALTNEY,
CHAS. H. SMITH,
Not'y Pub.

STATE OF GEORGIA,
Floyd County:

This indenture, made this the 29th day of October, in the year eighteen hundred and seventy-two, between Jas. H. Wright, of New Orleans, La., by his attorney in fact, Thomas T. Wright, of the first part, and David Adams, of Floyd County, Georgia, of the second part, witnesses:

That said James H. Wright, in consideration of the sum of one thousand dollars, the receipt whereof is hereby acknowledged, does hereby convey unto said David Adams, his heirs and assigns, the following real estate, to wit: One undivided sixteenth interest in and to that tract or settlement of land known as the Long Farm property, adjacent to the
85 city of Rome, inclusive of the ground acquired by exchange with J. J. Cohen, and inclusive also of the same acquired interest in the bridge now building across the Etowah River, and the small parcel of land near the southwest abutment of said bridge. The said Long Farm property comprising the major portion of lots of land numbers two hundred and eighty-five (285) and two hundred and eighty-six (286), and a portion (say thirty acres more or less) of two hundred and

seventy-six (276), lying next the river; also, the portion of two hundred and eighty-seven on the west side thereof. All lying and being in Floyd County, Georgia, and in the twenty-third district and third section, and containing 350 acres more or less. This deed conveying one undivided sixteenth interest in all of the same.

To have and to hold the said bargained premises to himself, his heirs and assigns forever, in fee simple, and the said Jas. H. Wright, his heirs, executors, and administrators, the said bargained premises will warrant and ever defend the right and title thereof against the claim of himself & his heirs, and warrants the same free from encumbrance so far as relates to him, as witness his hand and seal.

JAMES H. WRIGHT, [SEAL.]
By THOMAS T. WRIGHT,
Att'y in Fact.

86 I join in the above conveyance.

THOMAS T. WRIGHT. [SEAL.]

Signed, sealed, and delivered in our presence:
R. J. GWALTNEY.
CHAS. H. SMITH,
Not'y Pub.

STATE OF GEORGIA,
Floyd County:

This indenture, made this the 1st day of October, in the year eighteen hundred and seventy-two, between John R. Freeman, of said county, and T. T. Wright, Alfred Shorter, David Adams, Hines M. Smith, as trustee, witnesseth:

That Jno. R. Freeman, in consideration of the sum of two hundred dollars, the receipt whereof is hereby acknowledged, does hereby convey unto said parties of the second part, their heirs and assigns, in proportion to their respective shares in the Long farm property, the following real estate, to wit, that portion of land lying at the foot of Howard street, beginning at the center of said street, and one hundred feet, more or less, from low water mark, and running down the bank of the river to low water mark one hundred feet; thence at right angles across to the balance of my land lying on said street thirty-three feet, more or less; thence one hundred feet, more or less, from low water mark,
87 and up the river bank at right angles; thence to the beginning point; the same constituting one-half of the land at the end of Howard street, reserved by J. D. Green and myself; to have and to hold the said bargained premises, to himself, his heirs and assigns forever, in fee simple; and the said Jno. R. Freeman, for himself, his heirs, executors, and administrators, the said bargained premises will warrant and forever defend the right and title thereof against the claim of all persons, and warrants the same free from all encumbrance, as witness his hand and seal.

JOHN R. FREEMAN. [SEAL.]

Signed, sealed, and delivered in our presence:
J. BRANHAM, Jr.
CHAS. H. SMITH,
Notary Pub.

STATE OF GEORGIA,
Floyd County:

This indenture, made this the twenty-fifth day of September, in the year eighteen hundred and seventy-two, between John D. Green, trustee, and his wife, Clara E. Green, of Floyd County, Ga., and Alfred Shorter, David Adams, T. T. Wright, and Hines M. Smith, trustee, in proportion to their shares in the Long farm property, witnesseth:

That said John D. Green, trustee, and Clara E. Green, in consideration of the sum of two hundred dollars, the receipt whereof is
88 hereby acknowledged, does hereby convey unto said parties of the second part, in proportion as above, their heirs and assigns, the following real estate, to wit, commencing at a point six feet south of George W. Bowen's lower side yard gate, and running at right angles thirty-three feet to the centre of Howard street; from there one hundred feet in a southerly direction to the Etowah River; to have and to hold the said bargained premises to himself, his heirs and assigns forever, in fee simple, and the said Jno. D. Green, trustee, & Clara E. Green, their heirs, executors, and administrators, the said bargained premises will warrant and forever defend the right and title thereof against the claim of all persons and warrant the same free from incumbrance, as witness our hands and seals.

JOHN D. GREEN, [L. S.]
Trustee,
CLARA E. GREEN. [L. S.]

Signed, sealed, and delivered in our presence:
J. BRANHAM, Jr.
CHAS. H. SMITH,
Not'y Pub.

89 *Exhibit E.*

STATE OF GEORGIA,
Floyd County:

This indenture, made this the twenty-ninth day of October, between James H. Wright, of New Orleans, Louisiana, by his attorney in fact, Thomas T. Wright, of the first part, and Gustavus W. Nagle, of Floyd County, Georgia, of the other part, witnesses:

That said James H. Wright, in consideration of the sum of two thousand ($2,000) dollars, the receipt whereof is hereby acknowledged, does hereby convey unto said Gustavus W. Nagle, his heirs and assigns, the following real estate, to wit: one-eighth (⅛) undivided interest in and to that tract or settlement of land known as the Long farm property, adjacent to the city of Rome, inclusive of the ground acquired by exchange with J. J. Cohen, and inclusive also of the same acquired interest in the bridge now building across the Etowah River, and the small parcel of land near the s. west abutment of said bridge—the said Long farm property comprising the major portion of lots of land numbers two hundred and eighty-five (285) and two hundred (286) and a portion, say thirty acres, more or less, of lot two hundred and seventy-six (276) lying
90 next the river—also the fraction of two hundred and eighty-seven on the west side thereof, all lying and being in Floyd County, Georgia, and in the twenty-third district and third section, and containing 350 acres, more or less; this deed conveying one undivided eighth interest in all of the same; to have and to hold the said bargained premises to himself, his heirs and assigns forever, in fee simple, and the

said James H. Wright, his heirs, executors and administrators, the said bargained premises will warrant and forever defend the right and title thereof against the claim of himself and his heirs, and warrants the same free from encumbrance, so far as relates to him, as witness his hand and seal.

JAMES H. WRIGHT, [L. S.]
By THOMAS T. WRIGHT,
Attorney in Fact.

I join in the above conveyance.

THOMAS T. WRIGHT. [L. S.]

Signed, sealed and delivered in our presence:
R. J. GWALTNEY.
CHAS. H. SMITH, *Not'y Pub.*

GEORGIA,
Floyd County:

This indenture, made and entered into this the third day of Oc-
91 tober, eighteen hundred and seventy-two, between Alfred Shorter, of the county and State aforesaid, of one part, and Hugh D. Cothran, of said State and county, of the other part, witnesseth:

That the said Alfred Shorter, for and in consideration of the sum of five thousand dollars cash in hand paid at and before the sealing and delivery of these presents, by Hugh D. Cothran to the said Alfred Shorter, the receipt whereof is hereby acknowledged, doth hereby remise, release, and forever quitclaim unto the said Hugh D. Cothran, his heirs and assigns, one undivided fourth part or interest in the property hereinafter described, to wit, a certain tract of land in the county of Floyd, in the State of Georgia, opposite the city of Rome, and on the Etowah River, known as the "Long farm," containing three hundred and sixty-two acres, more or less, being the same estate conveyed to Thomas T. Wright, by deed of Francis Skinner, dated the second day of Feb'y, A. D. 1872, and conveyed by the deed of John T. Barry to the said Skinner, dated February 28th, A. D. 1870, and recorded in the clerk's office of the superior court of the county of Floyd and State of Georgia, in book R of deeds, pages 315, 316 and 317, No. 260, reference to
92 which, and to the prior conveyances therein mentioned or referred to, is hereby made for a more particular description of the granted premises, to have and to hold the granted one undivided fourth interest in the premises aforesaid, that was conveyed by the said Thos. T. Wright to the said Alfred Shorter by deed dated the 17th day of February, 1872, to said Hugh D. Cothran, his heirs and assigns, to his own proper use, benefit and behoof forever in fee simple.

The true intention of this deed being to invest the said Hugh D. Cothran, his heirs and assigns forever, with all and singular the right, title, interest and claim vested in the said Alfred Shorter by the said deed of Thos. T. Wright, dated Feb'y the 17th, 1872, as aforesaid.

And the said Alfred Shorter, for himself, his heirs, executors, administrators and assigns, will warrant and defend the right and title to the same against himself and his heirs, upon any claim arising or accruing since the date of the deed from Thomas T. Wright, dated Feb'y 17, 1872, to said Alfred Shorter for the said one-fourth interest in the
93 premises aforesaid, and no further. In testimony whereof the said

Alfred Shorter hath hereunto set his hand and seal the day and year aforesaid.

ALFRED SHORTER. [L. S.]

Signed, sealed, and delivered in presence of—
J. W. H. UNDERWOOD.
C. ROWELL,
Not'y Pub., Floyd County, Ga.

I also bargain, sell, and convey, for the consideration named in the above deed, all the interest I have in the land lying at the foot of Howard street, in Rome, Ga., purchased from John R. Freeman and John D. Green, on which one end of the bridge now stands, to said H. D. Cothran, his heirs and assigns.

Witness my hand and seal this Dec. 8th, 1872.

ALFRED SHORTER. [L. S.]

Signed, sealed, and delivered in presence of—
J. BRANHAM, Jr.
CHAS. H. SMITH,
Not'y Pub.

94 Upon hearing the case made by this bill, and the answer of the defendants, and after argument had, it is ordered and adjudged that the injunction prayed for be and the same is refused.

Dec. 11, 1872.

R. D. HARVEY,
Judge S. C. R. C.

Filed in office Dec'r 21, 1872.

A. E. ROSS, *Clk.*

95 Supreme court of the State of Georgia.

ATLANTA, GA.,
May 6, 1873.

The honorable supreme court met pursuant to adjournment. Present, their honors Hiram Warner, chief justice, H. K. McCay, and R. P. Trippe, judges.

ALFRED SHORTER & A. R. WRIGHT, PL'FFS in error,
vs.
G. W. NAGLE ET AL., DEF'TS IN ERROR.

This case came before the court upon a transcript of the record from the superior court of Floyd County, and after argument had, it is considered and adjudged by the court that the judgment of the court below affirmed.

Bill of costs: Entering case, $6; recording opinion, $6; remitter, $2; sheriff's fee, $1.25—$15.25.

Supreme court of the State of Ga.

CLERK'S OFFICE,
Atlanta, May 8, 1873.

I certify that the above is a true extract taken from the minutes,
96 and that A. R. Wright, esq., paid the above bill of cost.
Given under my hand and seal of office.

[SEAL.] Z. D. HARRISON, *Clk.*

It appearing to the court that the above stated case was taken to the supreme court, and the judgment of this court affirmed, as set forth in the above remitter, it is ordered by the court that said remitter be entered on the minutes of court as the judgment of this court.

May 19, 1873.

R. D. HARVEY,
Judge S. C. R. C.

97 *Amendment to bill.*

Bill, &c., in Floyd superior court.

ALFRED SHORTER & A. R. WRIGHT
vs.
G. W. NAGLE, D. ADAMS, ET AL.

The complainants, for amendment of their said bill, by leave of the court, for that purpose had, say that after the filing of their said bill & before the filing of the answer of the said defendants, they, the said defendants, applied to the board of commissioners of roads and revenue of said county, by petition, and obtained from said board an order or resolution granting and conveying to the said defendants the right, privilege and franchise of keeping and maintaining the said bridge as a public toll-bridge, subject to certain conditions therein stated, which said petition and order, or grant, are set forth in full, in the exhibit to the answer of the defendants, which is marked and designated as Exhibit I, and which the complainants ask leave to refer to. By
98 virtue and in pursuance of which grant the defendants did establish and open the said bridge to the public as a toll-bridge, charging the same rates of toll as are charged on the said bridges of the complainants, & have ever since so used and kept their said bridge. But the complainants show that the said board of commissioners, in the making and conferring said franchise, exercised legislative powers conferred upon it by the laws of this State; that the said grant is in the nature of a statute of the legislature; and that the same is an infringement of the said grant and contract made by the said superior court to and with the said H. V. M. Miller, under whom the complainants hold, & impair the obligation and validity thereof, and is repugnant to the Constitution of the United States, act. 1, sec. 10, paragraph 1, which prohibits a State from passing any law impairing the obligation of contracts, and the complainants pray that the said grant to said def'ts be, by this court, annulled and declared void and the defendants perpetually enjoined from any exercise of the privileges thereby
99 conveyed and granted.

WRIGHT & FEATHERSTON,
C. ROWELL, & E. W. BROYLES,
Solicitors for Compl'ts.

Service acknowledged and copy waived.
July 26, 1876.

SMITH & BRANHAM,
Resp's Att'ys.

Filed in office, July 26, 1876.

A. E. ROSS, *Clk.*

Bill for injunction in Floyd superior court.

ALFRED SHORTER & AUGUSTUS R. WRIGHT
vs.
G. W. NAGLE, D. ADAMS, A. M. SMITH, trustee, & Hugh D. Cothran.

The presiding judge of the court, Hon. John W. H. Underwood, having been of counsel in the case, it is agreed by the parties to said case, in pursuance of the statute in such case made and provided,
100 that Thomas W. Alexander, an attorney of said court, shall preside in the trial and hearing of said case.

It is further agreed that the judge, to wit, the said Thomas W. Alexander, shall hear and decide said case without the intervention of a jury upon the bill and amendment thereto and the answer of defendants and this agreement.

For the purpose of this case it is admitted and agreed that what is admitted by the answer shall remain admitted without further proof—that a grant of a franchise by the board of commissioners of roads and revenue for Floyd County, Georgia, as set forth in the answer be admitted without further proof, the complainants denying the power and rights of said board of commissioners to grant such competing franchise. The other matters set up in the answer of defendants by way of avoidance, such as fraud in the procurement of complainants' charter and franchise, and that complainants' charter and franchise were obtained without compliance with the provisions of law and irregularly, and that no
101 bond had ever been given as required by law, and that the ferry privileges of complainants had been adjudged to belong to the heirs of Z. B. Hargrove, and other matters in avoidance, are not to be insisted on on the hearing of said case, it being the desire and interest of the parties to have a final and legal decision upon the main questions in the case, to wit, whether or not the inferior court of Floyd County, Georgia, could and did grant the complainants or their assignors, an exclusive franchise such as is set up and claimed in complainants' bill, and whether or not therefore the subsequent grant of the bridge franchise described in the pleadings by the said board of commissioners to defendants is or not valid, & the right of complainants to the relief prayed for.

It is further agreed that either party may except to the decision which shall be made in the charge within thirty days of the adjournment of the court, as provided by law. Def'ts title to the lands claimed in de-
102 fendants' answers and to the lands on which the bridge piers are built is admitted to be in defendants, was set up in the answer.

SMITH & BRANHAM,
Resp'ts' Atty's.
WRIGHT & FEATHERSTON,
Att'ys pro Compl'ts.

It is agreed by all the parties that this case may be tried and finally disposed of by the presiding judge of this court, the Hon. Geo. N. Lester, without the aid of a jury, and that the foregoing agreement, as to all the matters therein contained, except as to the person to preside as judge, shall be of force and binding on the parties for the purposes of this trial, as fully as therein provided for the trial therein contemplated.

SMITH & BRANHAM,
Resp'ts Att'ys.
SHORTER & WRIGHT,
By AUGUSTUS R. WRIGHT.

103 This bill, and the amendment filed on the 26th of July, 1876, together with the joint answer of the respondents, having been by agreement between the parties and their counsel submitted to the court for a decision, without the intervention of a jury, upon the statement of facts contained therein, and the admission of the parties, the following judgment is rendered by the court:

It is adjudged and decreed that the inferior court of Floyd County had no power to grant an exclusive franchise to H. V. M. Miller, at the time the contract alledged to have been made with him was executed. It is further adjudged and decreed, that said inferior court had no power in making said contract to limit the right of their successors in the exercise of their powers, in an official capacity, to grant similar franchises or privileges to other persons, nor did the terms of the contract with H. V. M. Miller have that effect.

It is adjudged & decreed, that the board of commissioners of roads
104 and revenue of Floyd County, as the successors of said inferior court, had the power to grant to the respondents, upon application, the right to build a bridge across the Etowah River at the end of Howard street, in the city of Rome, and in the exercise of that power did not infringe upon the grant to Miller, did not impair the obligations of the contract with him, and was not violation of the Constitution of the United States, and therefore the injunction asked for is refused.

And it is further ordered and decreed that the respondents recover of the complainants dollars for costs in this behalf laid out and expended.

July 27, 1876.

T. W. ALEXANDER,
Special Judge.

Floyd superior court, July term, 1878.

ALFRED SHORTER, AUGUSTUS R. WRIGHT, *vs.* G. W. NAGLE, D. ADAMS, ET AL. } Bill, &c.

105 This case coming before the court for final hearing and adjudication upon the agreement of the parties shown in the record that the same may be tried and adjudicated by the court without the intervention of a jury as therein shown, the court, upon considering the bill and answer and amendments, & the facts therein stated, as admitted & referred to in the aforesaid agreement of the parties, & the facts in said agreement itself agreed upon by the parties, makes the following decisions and renders the following decree:

It is adjudged that the inferior court of Floyd County had no power to grant an exclusive franchise to H. V. M. Miller at the time the contract alleged to have been made was executed. It is further adjudged that the said inferior court had no power in making said contract to limit the right of their successors in the exercise of their powers, in an official capacity, to grant similar franchises or privileges to other persons, nor did the terms of the contract with H. V. M. Miller have that effect.

106 It is further adjudged that the board of commissioners of roads and revenues of Floyd County, as the successors of said inferior court, had the power to grant to the respondents upon application the right to build a bridge across the Etowah River at the end of Howard street, in the city of Rome, and in the exercise of that power

did not infringe upon the grant to Miller, did not impair the obligation of the contract with him, and was not violative of the Constitution of the United States, as alleged by the complainants.

It is therefore decreed by the court that the injunction prayed for by the compl'ts be finally refused, and that the bill by the complainants be dismissed.

The respondents recover of the complainants dollars costs.

July 10th, 1878.

GEO. N. LESTER,
J. S. C.

107 GEORGIA,
Floyd County:

I, A. E. Ross, clerk of the superior court in and for said county, do hereby certify that the above and foregoing is a true transcript from the records in my office of all the proceedings had in said case.

Given under my hand and seal of office, at office in Rome, Ga., this August 12, 1878.

[SEAL.] A. E. ROSS,
Clk S. C., F. C.

108 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you or some of you, being the highest court of law & equity of the said State in which a decision could be had in the said suit between Augustus R. Wright and Alfred Shorter, as plaintiffs, and Geo. W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh D. Cothran, as defendants, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of said Augustus R. Wright and Alfred Shorter, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment
109 be therein given, that then, under your seal, distinctly & openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Signed by my hand & the seal of my office attached this May 15th, A. D. 1879.

[SEAL.] A. E. BUCK,
Clerk U. S. Circuit Court Northern Dist. of Ga.

Writ of error allowed 13th May, 1879.

HIRAM WARNER,
Chief Justice Supreme Court Geo.

(Indorsed:) Writ of error to supreme court of Georgia. Augustus R. Wright & Alfred Shorter, vs. George W. Nagle & others.—Filed in office May 15, 1879. Z. D. Harrison, clerk supreme court of Georgia.

110 United States of America to George W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, & Hugh D. Cothran, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein Augustus R. Wright and Alfred Shorter are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Hiram Warner, as chief justice of the supreme court of Georgia, this 15th day of May, in the year of our Lord one thousand eight hundred & seventy-nine.

HIRAM WARNER,
Chief Justice Supreme Court Geo.

111 GEORGIA,
Fulton County:

Personally came before me, a notary public in & for said county and State, Augustus R. Wright, who, being duly sworn, deposes & says that deponent this day delivered to Joel Branham, the attorney of record for defendants in error in the within mentioned writ of error, & who is also the attorney of record in the case pending in the supreme court of the State of Georgia, the decision in which is complained of in said writ of error.

AUGUSTUS R. WRIGHT.

Sworn to & subscribed before me this day of 7th June, 1879.
J. R. TOWERS,
N. P. & Ex J. P.

(Have no seal of office.)

GEORGIA,
Floyd County:

Personally came before me, Max Meyerhardt, a notary public in & for said county and State, Augustus R. Wright, who, being duly sworn, deposeth and saith, that deponent did, on the 7th day of June, of this present month, deliver to Joel Branham, the attorney of record for defendants in error in the within mentioned writ of error, and who is also the attorney of record in the case pending in the supreme court of the State of Georgia, the decision in which is complained of in said writ of error.

AUGUSTUS R. WRIGHT.

Sworn to & subscribed before me this 19th June, 1879.
[SEAL.] MAX MEYERHARDT,
Not'y Pub., Floyd Co., Ga.

(Indorsed:) Citation. Augustus R. Wright & Alfred Shorter vs. George W. Nagle & others. Filed in office June 21, 1879. Z. D. Harrison, clerk supreme court of Ga.

(Indorsement on cover:) No. 1098. Augustus R. Wright and Alfred Shorter, plaintiffs in error, vs. George W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh D. Cothran. Georgia Sup. Court.—Filed 22nd December, 1879.

In Supreme Court of the United States.

October Term, 1879. No. 1,098.

ALFRED SHORTER AND A. R. WRIGHT

vs.

G. W. NAGLE ET AL.

In Error from the Supreme Court of Georgia.

R. O. Polkinhorn, Printer, Washington, D. C.

In Supreme Court of the United States.

October Term, 1879. No. 1,098.

ALFRED SHORTER AND A. R. WRIGHT

vs.

G. W. NAGLE ET AL.

In Error from the Supreme Court of Georgia.

At the suggestion of Mr. E. N. Broyles, counsel for plaintiffs in error in the court below, and who brought the case to this court, Mr. Wright, one of plaintiffs in error, and also counsel for plaintiffs in error in the court below, and Mr. Broyles for the plaintiffs in error, and myself as counsel for the defendants in error, prior to *the 6th day of December, 1879*, agreed to submit this case to this court by written argument, under the 20th rule.

Mr. Broyles resided in Atlanta and Mr. Wright and myself in Rome, Ga. A correspondence took place between myself and Mr. Broyles, beginning on the 6th of December, 1879, ending on the 14th of January, 1880, the original letters being all filed with the clerk of this court and printed with this statement. Those written by me to Mr. Broyles were delivered to me by him on the 14th day of this month, at my request and for the purpose disclosed by my note to him of that date.

I wrote a letter, fully explaining the *status* of the case in this court, to Mr. Wright, on the 18th of December last,

similar to that addressed to Mr. Broyles of that date, but perhaps more specific in its terms. This letter and two telegrams I have been unable to procure, nor have I been able to get copies, though I have twice called on Hon. A. R. Wright for them.

The defendants in error, having been fully advised of our agreement as above stated, employed and paid me a fee to come to Washington and submit the case under the 20th rule. I therefore left Georgia for this purposa on the 15th day of December last, arrived here on the 17th, was admitted to this court on the 18th, and immediately called for the record of the case.

I found—1st, that no security for costs had been given; that, *as was afterwards ascertained*, though a bond had been made, it had been filed with the clerk of the Supreme Court of Georgia, and did not reach this court until after a final stipulation had been filed in this court to submit the case as theretofore agreed on by counsel.

2d. That no appearance had been entered for plaintiffs in error.

3d. That the case had not been docketed.

Of these facts I advised Mr. Broyles and Mr. Wright fully by mail, and at the same time I wrote to the Clerk of the Supreme Court of Georgia for his certificate, which is also of file in this court, that I might move the docket and dismiss the case. I did not wish to dismiss the case, and I so said to Mr. Broyles and Mr. Wright, and wrote them both that if they would make a deposit for cost, cause an appearance to be entered for plaintiffs in error, that the case might be docketed and our agreement executed, I would not move to dismiss, otherwise I should do so. I suggested the name of Mr. Fillmore Beall, of this city, as an attorney of this court who would, for a very reasonable consideration, appear and submit the case for them. Neither

Mr. Broyles nor Mr. Wright were, or are they yet, attorneys of this court.

My suggestions, which were made in good faith, were accepted. Mr. Beall engaged to enter an appearance and submit the case, which he promptly did. A deposit for cost was made, the case docketed; a written stipulation was signed on the 24th of December last by Mr. Beall and myself and filed in the Clerk's office, to submit the case under the 20th rule, as was also a request to the same effect by Mr. Broyles over his signatnre and that of O. A. Lochrane, whose name was signed by Mr. Broyles, no doubt with his consent, he being an attorney of this court. Mr. Broyles, at the same time, filed his written argument in the case, Mr. Beall affixing his signature thereto; and I filed my argument likewise.

Nothing remained then to be done but to print the record and distribute the papers to the court. This Mr. Beall promised me should be done immediately after the recess.

I make this statement in my place, and refer to my letters and those of Mr. Broyles, and other papers of file, to verify it.

It will be seen, by reference to my letter of the 18th of December, that I improperly used the word "reinstate;" but the simple reading of that letter will show that I only meant to say that the case had not been docketed, and was not in court, and no one could have been misled by it. Certainly the plaintiffs in error could not have been induced to submit the case under the 20th rule thereby, for that had been agreed on two weeks before that letter was written, and before I left the State of Georgia.

It will be seen that I strenuously insisted that Mr. Broyles should come on to Washington. My sole purpose in threatening to dismiss the case, *which I could have done*, but which I did not desire to do, was that the case might

be brought into court and docketed, the record printed, and our agreement to submit it executed without delay, for a pressing engagement called me to Florida.

Feeling that our agreement had been executed, and that the papers would be handed to the court after the recess, I went to Florida, and did not expect to have my attention again called to the case.

On my return to Georgia, I was advised that Mr. Wright claimed to have been misled by my telegrams, and had expressed himself as dissatisfied with the submission.

In my letter to him, and subsequent telegrams, for I first wrote him fully, I stated but three facts, namely :

1. That no bond for cost had been filed here.

2. That no appearance for the plaintiff in error had been entered.

3. That the case had not been docketed.

And all of this was true, and the agreement to submit was made before I first left Georgia, two weeks before the writing of that letter, and before any telegram had been sent to him.

While it would give me pleasure to yield to Hon. A. R. Wright's wishes, the two letters from my clients, of file in this office, instructing me to insist on the submission, leave me no alternative. The defendants in error have expended their money on the faith of the agreement to submit the case.

Their counsel came here and did all that was necessary to be done to execute their agreement. And it is submitted that the agreement can not be now withdrawn without the consent of both parties.

Mr. Broyles in his request to the clerk to withdraw his consent, filed on the day of January, , says the agreement to submit, under the 20th rule, was freely and fairly made.

Defendants in error insist that the court take the case and decide it as provided by the rule.

See *Muller* vs. *Dows*, 94 U. S. Rep., 277.

The agreement cannot be annulled without a motion regularly made and served, on adverse counsel, within first ninety days of the term. I wrote to Mr. Wright on the 14th of this month that no movement should be made by defendants in error in this matter, until the last day, the 21st allowed by the rule, that he might appear and be heard in person.

J. BRANHAM,
For Defendant in Error.

WASHINGTON, D. C., *January 21st, 1880.*

LAW OFFICE
J. BRANHAM.

ROME, GA., *Dec. 6th, 1879.*

DEAR BROYLES:

I have recently seen Judge Wright & he is of opinion that he had better argue the bridge case by brief. I will have mine, with an abstract accompanying it, completed by to-day week, & will send you, if you desire, a copy. & if you can rely on my abstract I can send you as many copies as you wish—say 30, for a dollar or two, & will have them struck if you desire it. I have tried to be accurate & fair. I wrote Harrison to send me copy of the 5th assignment of error in the bill of exception, as the copy here does not contain it. Please see to it.

I will leave here Monday week for Washington.

Y'rs, truly,

J. BRANHAM.

ATLANTA, GEO., *Dec'r 8, 1879.*

COL. JOEL BRANHAM.

DEAR SIR: Yous of the 6th to hand. Please have me 30 copies of your abstract printed if Judge Wright's willing to pay for the same. I have no doubt your statement of the facts will be correct. & it will save us costs & trouble. I will have my brief made out and have it printed. May not get it ready by time you leave for Washington, but will have it ready by Jan'y.

Very truly,

E. N. BROYLES.

P. S. The 5th Exception was a blank—never filled out.

E. N. B.

ATLANTA, GEO., *Dec'r 9, '79.*

COL. JOEL BRANHAM.

DEAR SIR: I am inclined to visit Washington, D. C., but cannot get ready to go with you. I would like to be admitted in U. S. Sup. Court at same time you will be. & the question is how long will you be in Washington. I do not suppose I could get there before 27th Dec'r. Will you be there then. Please answer.

Yours, &c.,

E. N. BROYLES.

LAW OFFICE
J. BRANHAM.

ROME, GA., *Dec. 10, 1879.*

DEAR BROYLES:

Y'rs 8th & 9th both rec'd. I am really glad you are going to Washington. I will be there, I presume, on the 27th, but I fear the Court will be absent. It will likly adjourn for the Holidays. I have written to Darlington to W. to-day to know. You had better get ready & go earlier.

To expedite y'r preparation I send you a proof of my brief on the motion to dismiss; also, a copy of my old brief on the merits. The reference to Code in old brief is to Erwin's Rev. Code. I will give you a copy complete so soon as it is ready, but that sent is all. Can't you go on sometime next week. I hope to get the abstract I sent, tomorrow, altered as you may desire. Judge W. will cheerfully pay y'r way.

Y'rs, truly,

J. BRANHAM.

ATLANTA, GEO., *December 10, 1879.*

COL. JOEL BRANHAM,

DEAR SIR: I return you the proof-sheets. Withdraw those parts you have marked also; also the words "thus settling the law of the case," relating to the decision in 48 Ga. 367.

Please also have inserted immediately after your quotation of the act of 1805, Sect. XXXIII of act of 1818, Cobb's Dig., p. 952, down to the word provided. I inclose copy of the part I want inserted.

Yours, etc.

E. N. BROYLES.

LAW OFFICE
J. BRANHAM.

ROME, GA. *Dec. 11, 1879.*

DEAR BROYLES: Since writing you yesterday, I see that Congress adjourned for the holidays on 19th til 6th Jan. Judge Underwood says the court always adjourns for the holidays. Now hadn't we better wait til after Christmas & so cut our cards as to be in W. when Congress is in session. I will be there on the 27th of December, any how, but my trip will be prolonged about two weeks. I have

just told Mrs. Branham that I would likely send her on Monday & go myself first to Fla. & then join her in Washington about Christmas. The only trouble is about filing our brief within the 90 days. Except that we wish to do this ourselves, we might send them on in advance.

Y'rs, truly,

J. BRANHAM.

I have acquaintences in W. & can have our B.'s filed if necessary. B.

P. S. The proof came through all right. I will send you 30 copies to-morrow, as amended by you.

B.

J. J. DARLINGTON, *Attorney-at-Law.*

Office, 408 Fifth Street.

WASHINGTON, D. C., *Dec. 13, 1879.*

JOEL BRANLAN, Esq.,

DEAR SIR: The Supreme Court will adjourn next Friday, Dec. 19th, and, possibly, for several weeks. When it fixes the time to re-convene, I'll write you.

Will be glad to call on Mrs. B. & yourself, if advised of your arrival in W.

Yours truly,

J. J. DARLINGTON.

This letter is endorsed as follows:

ROME, *Dec. 15, '79*

Dr. BROYLES: I will go thro' Atlanta to-night, on my way to Fla. Will be in Washington about 25th. We can file our brief in time with clerk & be admitted, & submit the case after the recess. I sent y'r abstracts by to-day's express. Come on as soon as you can, & we'll frolic during Christmas-week.

Send me a line to Jacksonville, Fla.; I'll get it on my return.

Y'rs, truly,

J. BRANHAM.

P. S.—"Within the first ninety days of the term," I think excludes the recess. It is not within 90 days from the *beginning* of the term.

B.

LAW OFFICE
J. BRANHAM.

PLAINVILLE, GA., S. R. & D. R. R.,
Dec. 15th, 1879.

COL. E. N. BROYLES:

Upon a second consideration of Darlington's letter, I have concluded to be admitted before the court adjourns, & will go direct to Washington, then to Fla., & return to Washington. I will write you fully from Washington.

Y'rs, truly,

J. BRANHAM.

ATLANTA, GA., *Dec. 17, 1879.*

COL. JOEL BRANHAM,

DEAR SIR: Your several letters have been received. Some came when I was absent on business from the city, & others since you left Ga.; &, therefore, I have not answered them. Also copies of the abstract received.

I fear I will not be able to go to Washington on acc't of engagements here. I will, however, forward my abstracts & briefs in time to be filed; & under our agreement is not that all we have to do?

Under the rule No. 20—on this subject—when it says: "the court will receive printed arguments without regard to the No. of the case on the Docket, if the counsel on both

sides shall choose so to submit the same within the first ninety days of the term"; the ques. I ask is—what is meant by "submit"? Will not the simple filing of the written arguments be a submission in the meaning of the rule? If not, would not a written agreement between you and myself that we agreed to such submission be sufficient? Or would we have to go into court & make the submission orally, or by reading our arguments? I confess I do not exactly see how this is. Please ascertain & write me.

Very truly,

E. N. BROYLES.

LAW OFFICE
J. BRANHAM.

WASHINGTON, D. C., *Dec. 18th, 1879.*

COL. E. N. BROYLES,
Atlanta, Ga.

I was admitted to Supreme c't to day. I went immediately to look into our case. I find y'r case has not been docketed, there having been no appearance of counsel or provision for cost as required by 9th rule. The clerk hunted up the record. I find it will be necessary for pl'ff in error to deposit $100 for cost & to have an att'y *of this court* here to reinstate & docket the case. When this is done we can then submit under the 20th rule & the court will take up the case & and decide as if it had been advanced in the docket, & argued. But this must all be done by the 10th of Jan. or within the first 90 days of the term. The recess will not be excluded in the computation. The cl'k thinks the court does not count Sundays, & that the time may be extended to 20th, but this is a mere supposition of the clerk's. You can get y'r brief in by the 10th, & in the meantime, if you can't come on immediately, I have written Judge Wright that Beall the bro. of the dept'y

cl'k would ~~send~~ serve him here, in everything except the argument.

Now you understand let's get the case reinstated & the agreement to submit under rule 20 filed in writing by Wednesday next; and y'r argument in by or before the 10th Jan.

Can't you come immediately on rec'pt of this. If you leave by Kennesaw Route on 2:30 P. M. Train Sunday evening, you get here at 9, Monday night. Telegraph me & Judge Wright, & write me. I don't want to dismiss the case.

Y'rs, truly,

J. BRANHAM.

ATLANTA, GEO., *Dec'r 20, 1879.*

DEAR BRANHAM.

I have just written & telegraphed you & sent on the papers to the Clerk. But I was mistaken in one thing. I thought I had sent on the $200 bond to cov'r costs under Rule 10, but I see I filed it with Clerk of Ga. Supreme Court & a copy of it was included in the record sent up. I have just now gotten the original bond & sent it by mail to the Clerk of the Supreme Court of the U. S. That will do under Rule 10 I think. Judge Wright may send you $100 to cover these costs. If he does, & the bond I send makes the expenditures of that sum unnecessary, please retain the $100 for Judge Wright.

I am sorry I cannot be in Washington, but from sickness in my family, & other causes, I cannot go now.

Please have the case docketed & let it go through the form of a trial or hearing at least.

As you will see I made out new abstract, as I thought the first one did not come up to Rule 21 (4). I send you copy.

Yours, truly,

E. N. BROYLES.

CLERK'S OFFICE, SUPREME COURT OF THE STATE OF GA

ATLANTA, GA., *Dec. 20, 1879.*

ALFRED SHORTER & A. R. WRIGHT, *Plffs. in Error,*

vs.

G. W. NAGLE *et al.*, *Defts. in Error.*

I hereby certify that, on the 25th day of March, 1879, a judgment was rendered by the Supreme Court of the State of Georgia, in the above-stated case, in favor of George W. Nagle, Daniel Adams, Hines Smith, as trustee for his wife, and Hugh D. Cothran, and against Augustus R. Wright & Alfred Shorter; and that a writ of error to the Supreme Court of the United States was sued out, allowed, and filed in this office on the 13th day of May, 1879; and that a transcript of the record in said case, with original writ of error, original citation, and copy bond for costs, was transmitted by me to the clerk of the Supreme Court of the U. S., addressed to him at Washington, D. C.

Witness my signature, and the seal of said court affixed hereto, the day & year above written.

[SEAL.] Z. D. HARRISON,
Clk. S. C. Ga.

ATLANTA, *Jan. 14, '80.*

COL. E. N. BROYLES: I think it necessary for the vindication of my professional reputation, that you should state when we, as counsel, & when Judge Wright agreed to submit the case of A. R. Wright & Alfred Shuster vs. G. W. Noyle et al., in the Supreme Court of the United States, whether before or after I went on to Washington city—which was 15th December last.

Y'rs, truly,

J. BRANHAM.

ATLANTA, GEO., *Jan'y 14, 1880.*

COL. JOEL BRANHAM,

DEAR SIR: In reply to the above note, my reply is, that the agreement therein referred to was made before you went on to Washington, &, as I understood, when you left here you expected it to be carried out whilst you were at Washington. This I understood to be Judge Wright's understanding from letter he then wrote me. However, the agreement to submit under Rule 20, I do not consider binding on either party until it shall have been fully executed, and either party has a right to withdraw from it at any time before the case is actually submitted to the court.

Very respectfully,

C. N. BROYLES.

OFFICE OF
DABNEY & FOUCHE',
ATTORNEYS AT LAW.

ROME, GA., *January 12, 1880.*

JOEL BRANHAM, Esq.

DEAR SIR: In the case of A. R. Wright et al. vs. G. W. Nogle et al. now pending in the Supreme Court of the United States, this is to notify you that the Defendants in Error do not consent to withdraw from the agreement to submit said case under the 20th rule, but do insist and instruct you to have said case submitted under the rule. We consented to the submission in order to expedite the hearing of the case & for the same reason we now refuse to recede from the agreement to submit.

A. THEW H. BROWER,
East Rome Town Co.

R. T. FOUCHE', *Sect'y.*

OFEICE OF
DABNEY & FOUCHE',
ATTORNEYS AT LAW.

ROME, GA., *Jan'y 16, 1880.*

COL. J. BRANHAM.

DEAR SIR: We are sure that the arrangement to submit was made not only fairly, but that it was entirely agreeable to Judge Wright. I am also sure he wants to use the time to be gained by a revocation of the consent, not to load up with a speech and authorities, but to devise ways & means to perpetuate *his monopoly* of the bridge business. We do therefore most positively decline to consent to let it go over. I am thus positive least Judge Wright might be so far mislead again as to think that this letter is a consent instead of a refusal.

Very truly,

R. T. FOUCHE'.

I have written this letter after seeing Mr. Adams & he entirely agrees with me.

R. T. F.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1879.

Alfred Shorter and Augustus R. Wright,

Plaintiffs in Error,

VS.

G. W. NAGLE, et al.,

Defendants in Error.

Abstract and Argument on behalf of
Plaintiffs in Error, by
O. A. LOCHRANE and E. N. BROYLES.

Bill Filed November, A. D. 1872.

V. P. Sisson, Printer.

ABSTRACT OF THE PLEADINGS.

SUBSTANCE OF THE BILL.

In latter part of 1850, or early part of 1851, Alfred Shorter and ...., supposing that they were owners and proprietors exclusively, both by right of prescription, and also contract with the Inferior Court of Floyd county, to all ferry and bridge privileges on the Etowah and Oostanaula and Coosa Rivers in and about the city of Rome, and the charging of toll for transportation on the same, and the Inferior Court of the county aforesaid essaying to build and have constructed certain other bridges in and about said city, materially damaging said privileges, franchises and contracts, filed their bill of injunction to restrain the building of the same.

The said case came on for a hearing before Judge John H. Lumpkin, on the 12th day of April, 1851, and the injunction was refused by him. From this decision an appeal was had by the complainants to the Supreme Court of said State, and the decision below was confirmed. The Supreme Court deciding and holding that said complainants had a good and valid title to said ferry and bridge franchises and privileges, but that the same was not *exclusive*, and the Inferior Court did have the right to build other bridges and establish other ferries. In the meantime the said Inferior Court had involved itself in contracts for the building of other bridges. These complainants beg leave to refer to the said case and decision as often as may be necessary for either party, and have not attached a copy of the same because it would greatly increase the record. It is found in the 9th volume Georgia Reports, page 517.

They further decided, and it thereby became the law as expounded by the highest tribunal of the State, that if an exclusive grant was intended by the Inferior Court it ought to have been and must be contained in their contract.

The Inferior Court having involved itself in liabilities in contracts for the building, as aforesaid, of other bridges, and especially with one William R. Smith, to be built at Smith's ferry, at a bluff of lime rock at the upper end of town across the Etowah, amounting to several thousand dollars, and one at the foot of Bridge street front of the Court-house—a large part of the funds which had been subscribed failing to be paid—and in view of said decision, and with express reference to the same, made certain propositions to Dr. H. V. M. Miller as one of said bridge company and representative of the same, offering, on certain conditions, to grant power to said company and their heirs and assigns, all bridge and ferry privileges about the city on said rivers for three miles from the junction at the head of Coosa River, and to give to them the exclusive use and control of the same forever, and forever debarred themselves and their successors from establishing any other bridges or roads in any wise affecting or injuring their privileges—a copy of which said agreement is hereto inserted, marked exhibit No. 1, and which with its appended order extending the time for the execution is also recorded on the minutes of said Inferior Court. It is as follows:

FLOYD INFERIOR COURT, AT A CALLED TERM, JULY, 1851.

By an order of the Inferior Court heretofore passed, subscribing the sum of five hundred dollars to be appropriated to the erecting of free bridges across the two rivers, to wit: the Etowah and Oostanaula; and, in order more effectually to carry out said object, said court appointed a committee of five to take up private subscriptions, and contract for the building of said free bridges upon the faith of the said several sums subscribed; and, in conformity with said order, said committee proceeded to take up subscriptions for the aforesaid purpose, and thereupon entered into a contract for building a bridge across the Etowah river; and, after every effort being made on the part of said committee, which has been made known to said Inferior Court, by the petition of said committee for relief, setting forth in said petition that they could not raise money; that those having subscribed for said purpose on being called on have refused or failed to pay, and which failure or refusal is likely to inure to the great damage of said committee in the erection of said bridge, therefore they ask of said court to

make some arrangement by which they, the said committee, may be released from heavy expense, now thrown upon them by reason of the failure of the citizens of Floyd county to subscribe and pay to said committee.

Upon the aforesaid facts being made known, in order more effectually to relieve said committee, it is ordered by the court that the following contract be offered to H. V. M. Miller, one of the original bridge company: that for and in consideration of the large reduction of tolls to said county, and the removal of the new bridge across the Oostanaula up to the foot of Court House street, leading with it, being the place at which the original bridge on said river was located, or the erection of a new bridge at said place, to be built or removed during the present summer or fall, and then the present bridge to be closed up; and the further consideration of the relief of the first aforesaid committee and court in all the expenses they have in any wise incurred in erecting the half part of the new bridge now being built at the rock bluff on the Etowah River by one William R. Smith and the committee as aforesaid, and that said bridge shall be completed, provided nothing is hereby done to destroy the remaining half interest of said bridge belonging to said William R. Smith, according to the contract as entered into between the said Smith and Inferior Court, as changed and altered on the 27th day of May, 1851; and for and in consideration of said several causes moving, it is agreed and ordered by said Inferior Court, that franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Oostanaula at or near the city of Rome, county of Floyd, be, and the same is hereby vested in secured to the said H. V. M. Miller, his heirs and assigns forever; and that the franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Etowah River at or near the city of Rome, be, and the same is hereby vested in, and secured to said Miller, his heirs and assigns forever; and that the said franchises and privileges on the aforesaid rivers and the Coosa extend three miles from said junction every way, provided the same does not interfere with rights heretofore vested; and the half interest in said bridges, as first aforesaid, is hereby secured to the said H. V. M. Miller, his heirs and assigns in as full and complete a manner as by law can be transferred by said court to said Miller, so far as the same as is

not vested in the said William R. Smith, his heirs and assigns, as set forth in said mentioned contract with said Smith, bearing date the 27th day of May, 1851. And the said H. V. M. Miller binds himself, his heirs and assigns, to keep in good repair the bridges, to-wit: the one at the point designated, as aforesaid, across the Oostanaula, and one across the Etowah at the foot of Broad street, at the city of Rome, county of Floyd, in good repair for the trading public generally; and the tolls and privileges to be equally extended to the citizens of said county of Floyd, at each of the respective bridges, according to the basis of tolls agreed upon by said court.

The franchises and privileges heretofore, and at present, being in an unsettled state, causing much litigation and trouble to all parties; for the relief of which, and the aforementioned considerations this charter or contract is set forth to more fully define and secure to all parties their rights; and any omission in detail shall not preclude the aforesaid Miller the full and exclusive privilege within the aforesaid contract to the full and complete franchise, both public and private, against themselves and their successors, and others, so far as they are by law empowered; hereby debarring themselves from the privilege of conferring any further privilege and franchise in any wise, to individuals, or otherwise, by means of which the aforesaid franchises may be impaired, also, revoking all orders or decrees of said court in anywise conflicting with privileges and franchises hereby granted, provided the same is not now in use by others.

And the said Miller further binds himself, his heirs and assigns, not to erect a bridge, or bridges, across the Coosa River from the junction to the extent secured in the foregoing charter, nor confer the privilege to any one else whereby it may injure the interests of the city of Rome.

Four horse wagon, cotton or other produce for market	35c.
Four horse wagon, cotton or corn	50
Two horse wagon, cotton or corn	25
Two horse carriage and barouche, 30	40
Buggy and horse	20
Man and horse	10
Footmen	5

And the tolls imposed on the citizens of the county of Floyd shall be as follows, viz:

Four horse wagons ..... 25c.
Two horse wagons 15
Close carriages 25
Barouche 20
Buggies and one horse wagon 10
Wood, fodder, shucks, oats, bricks, market provisions not to exceed 5 per cent. on the value of the load.
Four horse wagon load of lumber, to and from 20
Two horse wagon load of lumber, to and from 10
Going to and from church on Sunday, free upon all the bridges.

It is therefore agreed by the said Inferior Court and the said H. V. M. Miller, that the foregoing contract for the more faithful and full compliance of the same be signed by said Inferior Court and said H. V. M. Miller, and the same be entered upon the minutes of said court.

J. M. SPULLOCK, J. I. C.
DENNIS HILLS, J. I. C.
WM. T. PRICE, J. I. C.
F. I. SULLIVAN, J. I. C.
H. V. M. MILLER, (L. S.)

WHEREAS, The Inferior Court of Floyd county having heretofore granted a charter to H. V. M. Miller, his heirs and assigns, for the purpose of erecting bridges across the Etowah and Oostanaula Rivers near the city of Rome, and application being made for an extension of one of the stipulations of the charter, by the terms of the aforesaid charter, the bridge across the Oostanaula was to have been completed during the summer and fall of eighteen hundred and fifty-one: Ordered by the court, that the time for the completion of the bridge be extended until the first day of January, eighteen hundred and fifty-three. Nothing in this order to be construed so as to alter or change any other stipulation or requirement of the aforesaid charter. This October 14, 1851.

J. M. SPULLOCK, J. I. C.
WM. T. PRICE, J. I. C.
F. I. SULLIVAN, J. I. C.
DENNIS HILLS, J. I. C.

Soon after the above date, Alfred Shorter bought out the entire interest of Miller and others in said franchises and contract, and proceeded in good faith to carry out his part of the contract. One of the considerations was: that the new bridge built across the Oostanaula at the junction of that river with the Etowah, and like the bridge across that river at or near the foot of Broad street, should be removed some half mile up said river Oostanaula, at the foot of Bridge, fronting the Court-house, or that it should be closed up and a new one built. The said bridge has just been completed, was covered and set on excellent and double stone pillars, and was of the value of twelve or fifteen thousand dollars. This, by the contract, became a dead loss to said Shorter. The said Shorter built a new and substantial bridge in front of the Court-house as he had contracted to do, and double stone pillars, of the value of $12,000 or $15,000, so that what he contracted to lose and what he contracted to do in this matter alone cost him $25,000 or $30,000; the addition to this said Miller had assumed to take the place of the Inferior Court in a most improvident contract with William R. Smith which said court had made, and this the said Shorter, by his purchase of the entire interest, did assume also.

Said bridge was partly constructed, but was situated at a narrow place in the river with one end on a steep where the water swept with great force, and before it was ready for use it was washed away. Shorter, by assuming this improvident contract for the Inferior Court, lost several thousand dollars more, thereby saving the people of the county harmless. In addition to these conditions said Shorter, and those under whom he claimed, were bound to keep for the use of the people of Floyd county and the city of Rome free bridges for all on foot and horse at all times, and for carriages going to and from church on Sabbath, and at small tolls at other times, and did reduce the tolls greatly in accordance with said contract.

Complainants show that, at great labor, trouble and expense, the obligations of said parties contracting with said court were fully and faithfully performed, and that they had been in the peaceful and quiet enjoyment of exclusive privileges under said contract for over twenty years.

On the..... ..... day of....., Augustus R. Wright

purchased of said Shorter one-half interest in said franchises for the sum of $25,000. During the late war between the states both of said bridges were burned. On the close of the war, and when the country was almost wholly exhausted of means, complainants were notified by the Inferior Court of Floyd county that unless they proceeded to rebuild said bridges at once said court would proceed to let out the franchise to other parties.

Complainants, at heavy cost, proceeded at once to rebuild both bridges at an expense of from $12,000 to $15,000. Complainants say that said Inferior Court and their successors, and the present road commissioners have again and again, in various ways, recognized the franchises and privileges of complainants under said contract.

Complainants further allege that G. W. Nagle and others, under and by virtue of authority from the commissioners of roads and revenues of Floyd county are proceeding to erect a public toll bridge across the Etowah River at the foot of Howard street, said point being less than three miles from the junction of the Etowah and Oostanaula rivers, and, therefore, within the franchises of complainants which, if permitted, will greatly injure and impair the rights and franchises of complainants. Complainants say that said board of commissioners, in making and conferring said franchise on said Nagle *et al.*, exercised legislative powers conferred upon it by the laws of this State. That the said grant is in the nature of a statute of the Legislature, and that the same is an infringement of the said franchise of complainants, and impairs the obligation and validity thereof, and is repugnant to the Constitution of the United States—Article 1, Sec. 10, Par. 1—prayer that the said grant to defendants be declared null and void, and defendants perpetually enjoined from the exercise of the privilege thereby conveyed and granted.

SUBSTANCE OF THE ANSWER.

Defendants in their answer admit the making of the contract for exclusive franchise stated in the bill; the building of the bridges as therein stated and the transfer of the franchise rights to complainants as alleged; also, the grant to defendants by the commissioners of roads and revenues of Floyd county of the right to

erect and establish a public bridge at the place and time alleged in the bill, and the fact that defendants were proceeding to build said bridge.

Defendants in their answer set forth various matters in avoidance of the claim of complainants tending to show irregularity in proceedings by complainants in procuring the grant of their franchise; the failure to give bond as required by statute; all of which become immaterial under the agreement of the parties, which is as follows, to-wit:

"For the purpose of this case, it is admitted and agreed, that what is admitted by the answer shall remain admitted without further proof; that a grant of a franchise by the board of commissioners of roads and revenues for Floyd county, Georgia, as set forth in the answer, be admitted without further proof—complainants denying the power and right of said board of commissioners to grant such competing franchise. The other matters set up in the answer of defendants by way of avoidance, such as fraud in the procurement of complainants' charter and franchise, and that complainants' charter and franchise were obtained without compliance with the provisions of law and irregularly, and that no bond had been given as required by law, and that the ferry privilege had been adjudged to belong to the heirs of Z. B. Hargrove, and other matters in avoidance, are not to be insisted on at the hearing of the case, it being the desire and intent of the parties to have a final and legal decision upon the main question in the case, to-wit: Whether or not the Inferior Court could and did grant to complainants, or their assigns, an exclusive franchise such as is set up and claimed by complainants; and whether or not, therefore, the subsequent grant of the bridge franchise to defendants is or is not valid, and the right of complainants to the relief sought."

Under said agreement and the bill and answer, the case by written agreement of the parties, all of which is found in the record, was referred to the decision of the Chancellor—without jury.

Defendants in their answer deny the authority of the Inferior Court to make a valid grant of exclusive franchise as claimed by complainants.

"That said court was invested with no legislative or quasi legislative authority or power whatever. But that since the Consti-

tution of this State (Georgia) was amended in 1856, so that the General Assembly of Georgia debarred themselves from incorporating bridges, and certain other companies, said court and its successors, and now the commissioners of roads and revenues of Floyd county are vested with legislative or quasi legislative powers, and exclusive powers on this subject; and, therefore, the incorporation of respondents' company, or the order making said bridge and streets public, has all the authority, sanction and effect of an act of the Legislature of this State, and cannot be interferred with by the unauthorized and void act of any public functionary of this State."

The case was first heard in the Superior Court of Floyd county on the motion to obtain an injunction. The motion was denied, and complainants carried the case to the Supreme Court and the decision below was affirmed. The decision was not a final decree disposing of the case, and it was carried a second time to the Supreme Court of the State before a decision of the highest court of the State was had on the final disposition of the case.

The points decided by the Judge of the Superior Court when the case was last before him are the following, to-wit:

1. It is adjudged that the Superior Court of the county of Floyd had no power to grant an exclusive franchise to H. V. M. Miller at the time the contract alleged to have been made was executed.

2. It is further adjudged that said Inferior Court had no power in making said contract to limit the right of their successors in the exercise of their powers in an official capacity to grant similar franchises or privileges to other persons. Nor did the terms of the contract with H. V. M. Miller have that effect.

3. It is further adjudged that the board of commissioners of roads and revenues of Floyd county, as the successor of the Inferior Court, had the power to grant to respondents, upon application, the right to build a bridge across the Etowah River at the foot of Howard street in the city of Rome, and, in the exercise of that power, did not infringe upon the grant to Miller; did not impair the obligation of the contract with him, and was not in violation of the Constitution of the United States, as alleged by complainants.

The court refused the injunction and dismissed the bill.

The decision was excepted to, and taken, by writ of error, to the Supreme Court of Georgia, and error assigned on the following grounds, to-wit:

1. "In holding the Inferior Court had no power to grant an exclusive franchise, upon full consideration paid, and bridges built according to contract for the benefit of the people and the passing of the people of the county free and at half price.

2. In holding that the decision of the Supreme Court of Georgia, deciding that the Inferior Court was the agent of the State of Georgia to make an exclusive grant in 1850, was not the law of this case, whether it originally had such power or not, and, that a contract made in pursuance thereof, was void.

3. In holding that the quiet and exclusive use of said privileges for twenty years did not give complainants a prescriptive right.

4. In holding the board of commissioners had power to grant any such bridge privilege, without just compensation having been first paid complainants."

The decision of the Chancellor was again affirmed by the Supreme Court of Georgia, and is now here for review.

Pam. Dec. Supreme Court of Ga., Feb. Term, 1879; pg. 35.

SPECIFICATIONS OF ERROR.

1 The State Court erred in holding that the grant of exclusive bridge and ferry franchises to complainants by the Inferior Court of Floyd county, under the contract set forth in the bill, was not valid and binding under the law and facts of the case.

2. The State Court erred in holding that the grant of the franchise of a public toll bridge to defendants by the board of commissioners of roads and revenus of Floyd county, within the limits of complainants franchise, was a valid grant and no infringement of the legal rights of complainants under their contract.

ARGUMENT

For Complainants in Error in Opposition to the Motion to Dismiss the Case for Want of Jurisdiction.

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1. The facts of the case show that complainants claimed to have certain exclusive rights under an alleged valid contract.

Defendants denied the validity of that contract, and, of consequence, the existence of any rights under it.

The court decided complainants had no such right, because the alleged contract was void.

The Supreme Court of the United States have jurisdiction to decide whether or not the decision of the State Court was correct or erroneous.

In Jefferson Branch Bank vs. Shelly, 1 Black, 436, (1, 2), 443, the Supreme Court of U. S., say: "The construction given by the courts of the States to State legislation and to State Constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts." See also 8 Wal., 575, (3), 582, 583.

2. Complainants having alleged the existence of their exclusive rights under a contract, further say their rights have been infringed by the defendants under legislative authority from the State.

Defendants admit the acts charged, but deny the infringement by denying the rights claimed by complainants.

The State Court in its decision sustains the position of the defendants.

If complainants have the rights they claim, then there is no question but those rights have been infringed. If infringed, how? This is the only question left. Do the facts show the infringement to be by a law of the State? Not by any specific act of the Legislature, it is admitted, but it is done by a general law of the State operating through its ministerial agents, the board of commissioners of roads and revenues of Floyd county, Georgia.

It seems to be settled law, in England that charters or franchises of this kind can be granted only by the King or Parliament, and in the United States only by the authority of the Legislature.—Franklin Bridge Co. vs. Young Wood, 14 Ga., 80, (1, 2.)

Under the laws of Georgia, the Inferior Courts—afterwards the board of commissioners of roads and revenues—in granting charters, bridge and ferry rights, acted only as ministerial agents of the Legislature of the State, and charters so granted are substantially acts of the Legislature and are laws of the State.

Hence the grant to build a public toll bridge to defendants within the franchise limits of complainants chartered rights is a law impairing the obligation of their contract.—14 Ga., 80, (5), 84, 85, (5); 9 Ga., 531; 9 Ga., 486, (7.)

Can the Legislature empower a board of commissioners of a county to do a legislative act impairing the obligation of a contract without violating the Constitution of the United States? Or can the Legislature of a State, through a local board, legally do that which the Legislature could not do itself directly? Does the Constitution of the United States inhibit the wrong itself or only a mode and means of the wrong?

ARGUMENT FOR COMPLAINANTS IN ERROR ON THE MERITS.

The following are the statutory provisions of Georgia on which complainants rely as giving authority to the Inferior Court to grant them the exclusive franchises claimed by them in the case, taken in connection with the construction thereof by the Supreme Court of the State in 9 Ga., 517, in April, 1851, some three months before the franchise was granted, to-wit:

"The Inferior Courts in the several counties in this State are hereby empowered, if they should deem it necessary, on application being made, to authorize the establishment of such ferries or bridges

as they may think necessary, other than where ferries and bridges have already been established by law, and to allow such rates for crossing thereat as are usual or customary on water-courses of the same width: *Provided, nevertheless,* That the Legislature shall, at all times, retain the power of making such alterations in the establishments made by the Justices of the Inferior Courts as to them may seem proper."

Act Dec. 6, 1805. Cobb's Digest, 945.

Also the Act of December 19, 1818, contains the following enactment:

"The Inferior Courts shall have power to establish ferries, to rate the toll to be taken, as well as those already established, as any which may hereafter be established, within the several Counties within which they may severally reside; and generally all other matters relative to ferries, which may, in their judgment, be of public utility, any law to the contrary notwithstanding."

T. R. R. Cobb's New Digest Laws of Georgia, pp. 946—952. Sec. XXXIII.

Section XXIX of Act of December 19, 1818, Idem. p. 952, is as follows:

"The Justices of the Inferior Courts of each county in this State, or a majority of them, shall have power and authority to hear and determine all matters which may come before them relative to roads, bridges, etc., as are authorized by law, either in term time, or while sitting for ordinary purposes, or at any special meeting held for that purpose."

Section II of Act of December 26, 1845, Cobb's New Digest, pp. 957, 958, is as follows:

"The Justices of the Inferior Court of the several counties in this State, or a majority of them, be, and they are hereby authorized, to contract for the building and keeping in repair of public bridges for such time and in such way as they may deem most advisable, either by letting the same to the lowest bidder, hiring hands for that purpose, *or in any other way that to them may appear right and proper.* And should they at any time let the same to the lowest bidder, that they be authorized to require and receive the same bond that commissioners now do."

1. Plaintiffs in error insist that, under the foregoing statutes, the Inferior Court of Floyd county had unlimited power with respect to the construction and repair of bridges by contract. And that

the *proviso* in the Act of December 6, 1805, was repealed by Sec. XXXIII of Act Dec. 19, 1818, and by Sec. II of Act Dec. 26, 1845, above quoted. Under the last recited act the Supreme Court of Ga., vol. 14, pp. 397, 398, in the case of Towles vs. Justices of Inferior Court of Chatham Co., declare that "unlimited power wtth respect to the construction and repair of bridges by contract is given to the Justices of the Inferior Courts of the several counties in this State."

In 9 Ga., pp. 485, 486, (7), the right to lay out and open a road being derived from the Inferior Court, acting under the Legislature, is declared to be a "legislative grant," and equally so is the right to build and keep up a toll bridge.

In the case of Shorter *et al.* vs. Smith *et al.*, 9 Ga. 517, decided in April, 1851, the right and power of the Legislature and the Inferior Court to grant exclusive franchise are treated as equal and the same. See head notes 5 and 6, and pp. 527, 528, 529. On page 531, the court say, "we have treated it" (complainants' right) "as a grant from the State."

In the case above cited, 9 Ga., 517, the complainants claimed a prescriptive right to the bridge and ferry franchise, and that such right was by implication an exclusive right.

The Supreme Court of this State, whilst conceding such to have been the common law rule, denied its existence in Georgia, and held such exclusive right could be had only by express grant or contract.

On page 529, the court say: "It is true that charters may be granted with peculiar privileges, and such grants are often deemed necessary to the promotion of public enterprises, which might not otherwise have been undertaken, and which might have been delayed to a much later period."

Said decision having been made, setting up a new rule on the subject under which complainants found they had no exclusive privileges, and by the same decision it being declared that charters could be granted giving such privileges, complainants were induced to accept such privileges under an express contract and to pay heavily for the same.

In making said contract, and in carrying it out at heavy expense, they relied upon the law of the State as then expounded by the highest court of the State.

"The fact that the Supreme Court of Georgia now holds that the Inferior Court could not grant exclusive franchises to complain-

ants can have no effect upon transactions in the past, however it may effect them in the future."—1 Wal., 175, 206. "The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, or decision of its courts, altering the construction of the law."—16 H., 416, 432; 3 Wal., 294, 302, 303; 9 Wal., 478 (6); 16 Wal., 678, (3), 690.

In 16 Wal., p. 690, the court say: "Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

To make this rule applicable it is not necessary that the former ruling should have been a direct decision on the point. It is enough if the decisions of the courts at the time of the contract "*favored the validity of the same.*"—9 Wal., 485, 486. Or if it had "*received judicial recognition* by the highest court of the State."—3 Wal., 294, 303.

The decision in 9 Ga., p. 517, did certainly both favor and recognize the authority of the Inferior Court to grant exclusive bridge and ferry rights.

It is evident that if the Inferior Court of Floyd county had the power to grant complainants exclusive franchise, the contract made was a clear and manifest execution of that power. Its language is too plain for doubt or equivocation. The language of the contract and the action of the parties under it for more than twenty years show this.

This is not disputed by defendants. Hence the rule of construction that grants from the State are construed strictly in favor of the public and against the grantee, and the many adjudications to that effect are harmless when applied to that contract, as under any reasonable construction, said contract vested in complainants the exclusive rights they claim if the Inferior Court have the power to make the contract.

From a careful consideration of the whole case, it will appear that the law, the justice and equity of the case is with the complainants.

O. A. LOCHRANE,
E. N. BROYLES.

Gillmore Beall

No 1098

SUPREME COURT

UNITED STATES.

OCTOBER TERM 1879.

PHILADELPHIA BAR ASSOCIATION

Alfred Shorter and A. R. Wright, Plaintiffs in Error,

- vs.-

G. W. Nagle, et. al., Defendants in Error.

—BILL, &c.—

FROM THE SUPREME COURT OF GEORGIA.

Brief of J. Branham for Defendants in Error.

NEVIN & SHANKLIN Printers, Rome, Ga

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BRIEF OF J. BRANHAM FOR DEFENDANTS IN ERROR.

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Brief of J. Branham for Defendants in Error.

The Legislature of Georgia in 1805 vested in the Inferior Courts of the State the following jurisdiction, to-wit:

"The Inferior Courts in the several counties in this State are hereby empowered, if they should deem it necessary, on application being made, to authorize the establishment of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, and to allow such rates for crossing thereat as are usual or customary on water-courses of the same width; *Provided, nevertheless,* That the Legislature shall, at all times, retain the power of making such alterations in the establishments made by the Justices of the Inferior Courts as to them may seem proper."

Act Dec. 6, 1805. Cobb's Digest 945.

The word, indicating the grant of jurisdiction, used in the caption of the Act, is the word *"establish."*

Under and by virtue of the jurisdiction, granted by this Act and no other, the Inferior Court of Floyd County, Georgia, in 1851 made the following grant, or license, to-wit:

FLOYD INFERIOR COURT, AT A CALLED TERM, JULY, 1851.

By an order of the Inferior Court heretofore passed, subscribing the sum of five hundred dollars to be appropriated to the erecting of free bridges across the two rivers, to-wit: the Etowah and Oostanaula; and, in order more effectually to carry out said object, said court appointed a committee of five to take up private subscriptions, and contract for the building of said free bridges upon the faith of the said several sums subscribed; and, in conformity with said order, said committee proceeded to take up subscriptions for the aforesaid purpose, and thereupon entered into a contract for building a bridge across the Etowah river; and, after every effort being made on the part of said committee, which has been made known to said Inferior Court, by the petition of said committee for relief, setting forth in said petition that they could not raise money; that those having subscribed for said purpose on being called on have refused or failed to pay, and which failure or refusal is likely to inure to the great damage of said committee in the erection of said bridge, therefore they ask of said court to make some arrangement by which they, the said committee, may be released from heavy expense, now thrown upon them by reason of the failure of the citizens of Floyd County to subscribe and pay to said committee. Upon the aforesaid facts being made known, in order more effectually to relieve said committee, it is ordered by the court that the following contract be offered to H. V. M. Miller, one of the original bridge company; that for and in consideration of the large reduction in tolls to said county, and the removal of the new bridge across the Oostanaula up to the foot of Court House street, leading with it, being the place at which the original bridge on said river was located, or the erection of a new bridge at said place, to be built or removed during the present summer or fall, and then the present bridge to be closed up; and the further consideration of the relief of the first aforesaid committee and court in all the expenses they have in any wise incurred in erecting the half part of the new bridge now being built at the rock bluff on the Etowah river by one William R. Smith and the committee as aforesaid, and that said bridge shall be completed, provided nothing is hereby done to destroy the remaining half interest of said bridge belonging to said William R. Smith, according to the contract as entered into between the said Smith and Inferior Court, as changed and altered on the 27th day of May, 1851; and for and in consideration of said several causes moving, it is agreed and ordered by said Inferior Court, that franchises and privileges

of opening ferries and building bridges, receiving and collecting tolls on the Oostanaula at or near the city of Rome, County of Floyd, be, and the same is hereby vested in and secured to the said H. V. M. Miller, his heirs and assigns forever; and that the franchises and privileges of opening ferries and building bridges, receiving and collecting tolls on the Etowah river at or near the city of Rome, be, and the same is hereby vested in, and secured to said Miller, his heirs and assigns forever; and that the said franchises and privileges on the aforesaid rivers and the Coosa extend three miles from said junction every way, provided the same does not interfere with rights heretofore vested; and the half interest in said bridges, as first aforesaid, is hereby secured to the said H. V. M. Miller, his heirs and assigns in as full and complete a manner as by law can be transferred by said Court to said Miller, so far as the same as is not vested in the said William R. Smith, his heirs and assigns, as set forth in said mentioned contract with said Smith, bearing date the 27th day of May, 1851. And the said H. V. M. Miller binds himself, his heirs and assigns, to keep in good repair the bridges, to-wit: the one at the point designated, as aforesaid, across the Oostanaula, and one across the Etowah at the foot of Broad street, at the city of Rome, County of Floyd, in good repair for the trading public generally; and the tolls and privileges to be equally extended to the citizens of said county of Floyd, at each of the respective bridges, according to the basis of tolls agreed upon by said court.

The franchises and privileges heretofore, and at present, being in an unsettled state, causing much litigation and trouble to all parties; for the relief of which, and the aforementioned considerations this charter or contract is set forth to more fully define and secure to all parties their rights; and any omission in detail shall not preclude the aforesaid Miller the full and exclusive privilege within the aforesaid contract to the full and complete franchise, both public and private, against themselves and their successors, and others, so far as they are by law empowered; hereby debarring themselves from the privilege of conferring any further privilege and franchise in any wise, to individuals, or otherwise, by means of which the aforesaid franchises may be impaired, also, revoking all orders or decrees of said Court in anywise conflicting with privileges and franchises hereby granted, provided the same is not now in use by others.

And the said Miller further binds himself, his heirs and assigns, not to erect a bridge, or bridges, across the Coosa river from the

junction to the extent secured in the foregoing charter, nor confer the privilege to any one else whereby it may injure the interests of the city of Rome.

Four horse wagon, cotton or other produce for market.....35c.
" " " " corn.....50
Two " " " " 25
" " carriage and barouche, 30.....40
Buggy and horse.....20
Man and horse.....10
Footmen.....5

And the tolls imposed on the citizens of the County of Floyd shall be as follows, viz:

Four horse wagons.....25c.
Two " " 15
Close carriages.....25
Barouche,.....20
Buggies and one horse wagon.....10
Wood, fodder, shucks, oats, bricks, market provisions not to exceed 5 per cent. on the value of the load.
Four horse wagon load of lumber, to and from.....20
Two " " " " " 10
Going to and from church on Sunday, free upon all the bridges.

It is therefore agreed by the said Inferior Court and the said H. V. M. Miller, that the foregoing contract for the more faithful and full compliance of the same be signed by said Inferior Court and said H. V. M. Miller, and the same be entered upon the minutes of said Court.

J. M. SPULLOCK, J. I. C.
DENNIS HILLS, J. I. C.
WM. T. PRICE, J. I. C.
F. I. SULLIVAN, J. I. C.
H. V. M. MILLER, (L. S.)

WHEREAS, The Inferior Court of Floyd County having heretofore granted a charter to H. V. M. Miller, his heirs and assigns, for the purpose of erecting bridges across the Etowah and Oostanaula rivers near the city of Rome, and application being made for an extension of one of the stipulations of the charter, by the terms of the aforesaid charter, the bridge across the Oostanaula was to have been completed during the summer and fall of eighteen hundred and fifty-one: Ordered by the Court, that the time for the completion of the bridge be extended until the first day of January,

eighteen hundred and fifty-three, nothing in this order to be construed so as to alter or change any other stipulation or requirement of the aforesaid charter, this October 14, 1851.

J. M. SPULLOCK, J. I. C.
WM. T. PRICE, J. I. C.
F. I. SULLIVAN, J. I. C.
DENNIS HILLS, J. I. C.

The plaintiffs in error became the owners of this grant by assignment from Miller, and have long enjoyed the exclusive privileges contained therein.

The Inferior Courts were abolished by the Constitution of 1868. Const. of Ga. 1868. Sec. XIV.

See Code of Ga. 1873, 5126.

The power over this subject matter which had been vested in these Courts, was in pursuance of the above section of the Constitution of 1868, and by the Act of Dec. 13, 1871, vested in the Commissioners of Roads and Revenues for the County of Floyd. The words by which this power was transferred to the Commissioners are as follows: "Said Board shall have exclusive jurisdiction when sitting for County purposes, over the following subject matters, to-wit: * * *. 3rd. In establishing, altering and abolishing all roads, bridges and ferries in conformity to law."

Laws. Ga. 1871—2, pg. 225, sec. IV.

Under and by virtue of the jurisdiction thus transferred to the Commissioners of Roads and Revenues, it being identical with that before conferred on the Inferior Courts by the Act of 1805, the Commissioners, at the December Term 1872, upon the following petition made the following grant or license to the defendants in error, to-wit:

GEORGIA, } *To the Honorable Commissioners of Roads and*
FLOYD COUNTY. } *Revenues for said State and County:*

The petition of H. D. Cothran, David Adams, G. W. Nagle, and H. M. Smith, Trustee, respectfully sheweth, that they are the owners of a tract of land adjacent to the city of Rome, and which was heretofore known as the "Long Farm Property," lying on the South-East side of the Etowah river. That they also own certain ground on the North-West side of said river, at the foot of Howard street. That they have surveyed the said "Long Farm Property" into town lots and streets, as will be seen by the map hereto accompanying. That some of said streets connect with the Spring Creek road, and can be made to connect with the Van Wert, and

Cedar town, and Cave Springs roads by a much easier, nearer and far better route than the present circituous and hilly ways which cross the river at Etowah bridge. Your petitioners show that these extensions can be made with little or no cost to the county by running through said Long Farm direct to the Gin House on the Old Cooley Farm, and thence along the lot lines dividing the Jones and Mobley Farms; to which arrangement said Jones and Mobley have consented and will give a sufficient strip of land therefor, as will also the parties owning the land between said Gin House and the Long Farm. These routes will be almost entirely level, and will save greatly in distance and in the character of the roads. That they have now completed, across the Etowah river, at the foot of Howard street, a substantial and safe bridge upon their own land upon both sides of the river; that the completion of said bridge, and the opening of said streets and highways will be of a great advantage to the Citizens who live upon the South bank of the Etowah river, in that it will shorten their travel to Rome from one and a half to three miles. That the opening of these surveyed lots to the public will greatly benefit the growing population of Rome, by enabling them to purchase cheap and pleasant homesteads. That it will greatly lessen the danger of crossing the Rome railroad track by wagons and other vehicles, as is now experienced at the present bridge across the Etowah river, the mouth of said bridge being only fifteen feet from said track and which danger will soon be increased by reason of the building of the Memphis Branch Railroad.

Your petitioners further show that they have already sold some, and had application for many of said lots by citizens of Rome, and those who contemplate citizenship and whose business is at a convenient distance from said lots. Your petitioners further show that the prices affixed are not exceeding one-fourth (¼) of the price at which vacant lots on Howard and South streets are sold, and this difference in price will induce the speedy settlement of said lots by mechanics and merchants, whose business is in the lower part of the city. Your petitioners declare that, while they seek their personal profit and advantage in the sale of said lots, they have specially considered the great public advantage of such an extension of the city of Rome, and, in this view, they have proposed to the Mayor and Council of the city of Rome, that all of said territory be brought into the limits of the city of Rome by an amendment to the charter. They further declare that they have not erected said bridge with any view of seeking profit from the tolls thereof,

but as the only convenient transit across said river, and therefore they will most willingly submit to such rates of toll as will pay a net income of legal interest upon the cost of the same, and the incidental expenses of keeping said bridge in repair. They therefore ask that your Honorable Body will fix the rates for a year only at this hearing, as such rates may be annually decreased by the increase of travel over the same. Your petitioners further declare that if your Honors shall deem such bridge and such highways of public necessity, and yet shall hesitate about granting them a charter for the same on account of the supposed or pretended rights of Alfred Shorter and A. R. Wright, they, your petitioners, are ready and willing to turn over said bridge to them on receiving from them the cost of its erection—provided they will open it to the public and keep it open at no greater rates of toll than the bridges owned by them. This proposition has been made by them and rejected.

For all of which reasons your petitioners ask that said bridge at the foot of Howard street be established and declared by your Honorable Body to be a Public Bridge, and that you fix such rates of toll as you may think just and proper, and also fix the amount of such bond as you may require, and also declare such street or streets, as you may designate on said map, as public streets or highways. And to this end your petitioners will ever pray, &c.

SMITH & BRANHAM,
Attorneys for Petitioners.

GEORGIA, } *Office Board of Commissioners of Roads and*
FLOYD COUNTY. } *Revenues. Regular Session.*

On hearing and considering the application of Messrs. Cothran, Adams, Smith and Nagle, for the establishment of the bridge recently built by them across the Etowah river, as a Public Bridge, and also, the opening and establishing of certain roads leading from the same as Public Highways, and also to fix the tolls over said bridge,

WE, The Commissioners, agree that there is, in our opinion, a great public necessity for said bridge, and said connecting highways; that such a crossing of Etowah river has long been demanded and prayed for by the people who live on Spring Creek and along the South side of Etowah river, and in the direction of Van Wert, Cave Spring and Cedar Town. That it will make a much nearer and much better road to the Euharlee district of Bartow County, where trade is sought for by our merchants; that it will greatly lessen the danger of crossing the railroad track near the

mouth of the old bridge at the foot of Broad street; that the proximity of said track to said bridge abutment (about fifteen feet) has been, heretofore, by this court, declared a public nuisance, and one that greatly endangers the lives and property of our people.

While we are well assured that all the allegations named and set forth in the application are true, we, nevertheless, cannot unconditionally grant said petition for the reason, and that only, that we are advised there is now a bill pending before his Honor, Judge Harvey, involving the question of our right to grant such an order as is prayed for, and it may be decreed this body shall await the decision upon said bill. It is, however, adjudged by us that, so far as we have any right or privilege to grant said application, we do so, provided it is not in contempt of the proceedings now pending; and, provided further, that it does not make the county, or ourselves, liable to said Shorter and Wright for damages. It is further ordered and adjudged that when said bridge is opened by operation of any judgment or decree, or by operation of law, the rates of toll for the first twelve months shall be the same as are now charged over the bridges now used in said city. We do further order and declare upon like conditions, that the streets designated on said map as Howard and Maple streets, be established as Public Highways, provided they are first put in good order and condition by the petitioners. We further order that, when said bridge is opened to the public, and before it is actually used by the public, the petitioners shall make and file in this office a good bond, with security, in the sum of ten thousand dollars, conditioned to pay all damages that any person may sustain in person or in property, by reason of any deficiency in or want of proper and safe construction of said bridge.

WM. G. GAMMON, Chairman,
JNO H. DENT,
HENRY W. DEAN,
JOHN SKINNER.

The plaintiffs in error, in November, 1872, filed their bill to enjoin the opening of defendants' bridge to the public on the ground that they had the exclusive right to bridge and ferry privileges for three miles up and down the three rivers at Rome.

The hearing was had in chambers, the injunction was refused, and the case taken, by writ of error, under Act of 1870, Code 3212, to the Supreme Court of Georgia, and the judgment of the court below affirmed. 48 Ga., Rep. 367. Thus settling the law of the case.

The case being still in Court, and awaiting a verdict and final decree in accordance with the decision of the Court, the complainants, at the July Term 1876, of the Superior Court, amended their bill.

The amendment was filed on the 26th day of July, 1876. It sets forth no facts, other than those contained in the original bill and answer.

The object of this amendment was to make a Federal or Constitutional question. The allegation is as follows: "Complainants show that the said Board of Commissioners in making and conferring said franchise exercised legislative powers conferred upon it by the laws of this State; that said grant is in the nature of a statute of the Legislature; and that the same is an infringement of the said grant and contract made by the Inferior Court to and with the said H. V. M. Miller, under whom the complainants hold and impairs the obligations and validity thereof, and is repugnant to the Constitution of the United States. Art. 1, sec. 10, paragraph 1, which prohibits a State from passing any law impairing the obligations of contracts."

By agreement of parties, made July 29, 1876, all secondary questions were withdrawn from the consideration of the Courts, and the main question, to-wit: "Whether or not the Inferior Court of Floyd County, Georgia, could and did grant to complainants, or their assignee, an exclusive franchise, such as is set up and claimed in complainants' bill; and, whether or not, therefore, the subsequent grant of the bridge franchise, described in the pleadings by the said Board of Commissioners to defendants is, or not, valid, and the right of complainants to the relief prayed for," was submitted to T. W. Alexander, Chancellor, *pro haec vice*, without the intervention of a Jury. The Chancellor repeated the decision of the Supreme Court. The case was then taken again to the Supreme Court of Georgia, and the judgment again affirmed.

58 Ga. 606.

Thereafter counsel for complainants discovered that the decision of the Chancellor *pro haec vice* did not *dismiss the bill.* And the case was again called up in the Superior Court and submitted, finally, to George N. Lester, one of the Chancellors of the Superior Courts of the State, presiding in Floyd Superior Court at the July Term 1878, when the Court decided as follows:

1. "It is adjudged that the Inferior Court of the County of Floyd had no power to grant an exclusive franchise to H. V. M. Miller at the time the contract alledged to have been made, was executed.

2. It is further adjudged that said Inferior Court had no power in making said contract to limit the right of their successors in the exercise of their powers in an official capacity to grant similar franchises or privileges to other persons. Nor did the terms of the contract with H. V. M. Miller have that effect.

3. It is further adjudged that the Board of Commissioners of Roads and Revenues of Floyd County, as the successor of the Inferior Court, had the power to grant to respondents, upon application, the right to build a bridge across the Etowah river at the foot of Howard street in the city of Rome, and, in the exercise of that power, did not infringe upon the grant to Miller; did not impair the obligation of the contract with him, and was not in violation of the Constitution of the United States, as alleged by complainants."

The Court refused the injunction and dismissed the bill.

This decision was excepted to, and taken, by writ of error, to the Supreme Court of Georgia, and error assigned on the following grounds, to-wit:

1. "In holding the Inferior Court had no power to grant an exclusive franchise, upon full consideration paid, and bridges built according to contract for the benefit of the people and the passing of the people of the County free and at half price.

2. In holding that the decision of the Supreme Court of Georgia, deciding that the Inferior Court was the agent of the State of Georgia to make an exclusive grant in 1850, was not the law of this case, whether it originally had such power or not, and, that a contract made in pursuance thereof, was void.

3. In holding that the quiet and exclusive use of said privileges for twenty years did not give complainants a prescriptive right.

4. In holding the Board of Commissioners had power to grant any such bridge privilege, without just compensation having been first paid complainants."

The decision of the Chancellor was again affirmed by the Supreme Court of Georgia, and is now here for review.

Pam. Dec. Supreme Court of Ga, Feb. Term 1879; pg. 35.

MOTION TO DISMISS.

It will be seen that the bill of exceptions does not follow the decision of the Chancellor, but seeks to interweave into the case points or arguments that are not embraced therein. A comparison of the grounds of error with the decision of the Chancellor will show that the sole ground of exception to the decision, or any part thereof, is, that the Court erred in holding that the Inferior Court had no power to make an exclusive grant.

Defendants in error move to dismiss the case for want of appellate jurisdiction in this Court, and because the case made is not within the 25th section of the Judiciary Act of 1789.

"It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the Court impaired the obligation of a contract and violated the provisions of the Constitution of the United States, and that this claim was overruled by the Court, but it must appear, by clear and necessary intendment, that the question must have been raised and *must have been decided*, in order to induce the judgment."

The Court has no jurisdiction when the decision involves only a question of State law:

Medberry et. al. vs. St. Ohio. 24 How. 413.
Commercial Bank vs. Rochester. 15 Wal. 639.
Williams, Trustee, vs. Oliver et. al. 12 How. 124.
Crowell vs. Randall. 10 Pet. 392.
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R. R. Co. vs. Rock. 4 Wal. 177.
Hoyt vs. Shelden. 1 Bl. 518.

Or, when the decision turned upon the *construction* of a State law:

The Grand Gulf R. R. & Bk. Co. vs. Marshall. 12 How. 165.
Miller vs. Nichols. 4 Wheat 311.
R. R. Co. vs. McClure. 10 Wal. 511.
Conklins' Treatise. 5 Ed. 43.

Or, when a Federal question, though made, is not decided:

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Or, where the question presented is in to general a form:

Messenger vs. Mason. 10 Wal. 507.

The grant of the Board of Commissioners to the defendants in error is a ministerial act, and not a law.

The Legislative power is in the General Assembly.

2. It is further adjudged that said Inferior Court had no power in making said contract to limit the right of their successors in the exercise of their powers in an official capacity to grant similar franchises or privileges to other persons. Nor did the terms of the contract with H. V. M. Miller have that effect.

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The Legislative power is in the General Assembly.

Const. Ga. 1868. Art. 3, sec. 1.

Code of 1873. Sec. 5037.

Sedgwick on construction of St. and Const. Law. 124. 137-8. 150-1.

The Franklin Bridge Co. vs. Young Wood. 14 Ga. 80.

The grant is only a license. This is the term used in the Code of Ga. sec. 670, par. 3.

Young & Calhoun vs. Harrison. 6 Ga. 144 is to the same effect.

The limit of a license is ten years. Code 670.

The Courts were authorized to grant *charters* by the Act of Dec. 28, 1843, and not by the Act of 1805, under which the plaintiffs' grant was made. Such grants were limited to 14 years.

Cobb's Digest, 542.

The Code extends the limit to 20 years. Code sec. 1676, par. 2.

Even a *charter* so granted by the Courts is not an exercise of Legislative power.

Franklin Bridge Co. 14 Ga. 84 to 86 (5).

To make a Federal question, in such a case as this, it should appear that the State had made an exclusive grant to the plaintiffs in error. This should not be the question in controversy, especially if it depends solely upon the meaning of a State statute.

BRIEF ON THE MERITS.

Complainants claim the exclusive right in perpetuity to build bridges and take toll over the Etowah and Oostanaula Rivers and within three miles of their junction at Rome, under exhibit No. 1 to their bill. And seek to enjoin defendants from opening their bridge to the public, either as a free or toll bridge, so as to interfere with their alleged rights. They do not seek to enjoin the use of defendant's bridge as a private bridge.

The answer of the defendants denies their right to the injunction for the reasons therein stated. And mainly upon the ground that complainants have no exclusive privileges whatever. Exhibit No. 1 is an alleged grant by the Justices of the Inferior Court. By what authority was it made?

"The State has a right to erect bridges whenever and wherever the Legislature may deem them necessary for the convenience of the public." And it may grant as many bridge rights as is pleases.

Young & Calhoun vs. Harrison. 6 Ga. 130 (3).

Williams vs. Turner. 7 Ga. 352.

Greer vs. Hangabook. 47 Ga. 282.

The Justices granted the charter, so far as they had authority to do so. See exhibit No. 1. They seem to doubt their power in the premises.

The complainants *made no application* for license, according to their statement in the bill. But defendants say they procured the charter, and it was not the voluntary offering of the Court.

They gave no bond for the performance of their duties and obligations.

They cannot be compelled to execute their part of their alleged contract, which they claim endureth *forever*.

The contract is *nudum pactum* unless the justices had the power to grant exclusive privileges, not only in fact, but in law.

1 Par. on Con. 383 and note 3.

The proprietors may discontinue and therefore the justices cannot enforce the contract.

Code 689. 25 Ga. 459.

The Commissioners of Roads and Revenue of Floyd county have licensed the defendants' bridge as a public bridge, but not as an exclusive one, as far as they have authority to do so, and have declared it a public necessity in the strongest terms. It was in their discretion to do so. They were clothed with "exclusive jurisdiction" "in establishing, altering and abolishing all roads, bridges and ferries in conformity to law."

See Act 1871-2, page 226 and 41 Ga. 222.

And therefore no injunction can issue against them.

See 18 Ga. 475. 20 Ga. 134. Story, Eq. 875.

The justices of the Inferior Court exercised the powers of three distinct institutions.

A Court sitting semi-annually for civil business, under the Constitution, with certain powers.

Cobb's Dig. 1122.

A Court of Ordinary.

A body sitting for County purposes and as a *quasi* corporation.

And, while sitting for one purpose, they could not exercise the powers of the other Courts.

9 Ga. 485. 3 Kelly 40 (3).

While sitting as a Civil Court they had power to grant charters.

Cobb's Dig. 542; Act 1843.

But they could not charter for a longer period than 14 years, until the adoption of the Code, when the time was extended to 20 years.

Act 1843; sec. 285.

While sitting for County purposes they only had power to license and not to charter.

Authority to establish a bridge, means only authority to license. The Code uniformly uses this term.

Code sec. 670, par. 3, 720. 6 Ga. 144.

The word license means permission.

11 Mich. 45; 6 Wheat 190; 5 Hill 211; 5 Cowen 462.

"*Highway*," or "*road*," includes bridges upon the same.

Code sec. 5.

They had express power to open roads. To discontinue such roads, etc., as may be found useless and to alter roads so as to make them more useful and convenient as often as occasion shall require.

20 Ga. 129-30. 9 Ga. 478.

And they and their successors have the same power over bridges.

20 Ga. 364. Code 693. Acts 1871-2, 226 (51).

For bridges erected under an Act of the Legislature, or under order of the Inferior Court, are public bridges.

Cobb's Dig. 944 (5), Code 667.

The same is true of roads.

Cobb's 943 (1), Code 597.

Both may be discontinued as public bridges or roads by the Court.

And the owner of a public bridge may discontinue it.

Code 689.

Before the adoption of the Code the Court, the licensees, might have discontinued, at any time, at their option. For the license was not granted for any definite period. But by the Code the license is limited to 10 years.

Code 670.

———o———

The Justices had no power to grant exclusive privileges unless that power is "found in and derived from the laws of the land and exercised in the mode and manner that law prescribes."

"Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent rights of Legislation, like the Legislature of the State; but their authority is delegated; and their powers, therefore, must be strictly pursued. *Within* the limits of their charter, their acts are valid; *without* it, they are void."

12 Ga. 424.

6 Peters 729; U. S. vs. Arredondo.

9 Cranch 87.

10 Ga. 206 (18).

41 Ga. 376; Dart vs. Orme.

8 Conn. 254; Willard vs. Killingworth.

10 Conn. 442; Higley vs. Bruce, affirms Willard vs. Killingworth.

2 Kansas 127-8, 134; Commissioners of Shawnee Co. vs. Carter.

31 Vermont 153; State of Vermont vs. Towns of Williston and others.

In this case it was held that the County Court was a Court of limited jurisdiction, exercising only express powers, and, while authorized to order the building of bridges, an order specifying the *kind* of bridge to be built was void.

30 Md. 218; Horn vs. Mayor and City of Baltimore.

"All ferries in Maine derive their authority solely from the license of the sessions. The person keeping any such ferry has no vested interest therein, beyond the public control, the franchise itself not being granted by the sessions; but only the right to receive a fixed compensention for certain services when performed. The sessions may therefore license as many ferries at the same place as may suit the public convenience."

8 Greenl. 365; Day vs. Stetson.

U. S. An. Dig. 2 Vol. 423 (1).

"The Board of Commissioners of a County is a *quasi* corporation, a local organization which, for purposes of civil administration, is vested with a few functions characteristic of a corporate existence. A grant of powers to such a corporation must be strictly construed."

11 Ohio (N. S) 183; Blanchard vs. Bissell.

U. S. An. Dig. 1861, 147.

If public agents make contracts beyond the scope of their authority, and which result in injury and damage to others, the public is not bound by them, though, under similar circumstances, private individuals would be bound by such acts.

7 Cranch 366; Lee vs. Munroe & Thornton.

Story on Agency 307 a.

In some cases public agents and officers, who exceed their authority, make themselves individually liable.

1 Par. on Con., page 106.

———o———

The powers of the Justices to establish bridges is contained in the following statutes:

Act 1799, Cobb's Dig. 944, Sec. 11.

This section makes bridges so established public bridges, and gives to the Court "full power and authority to appoint the *places* for erecting public bridges."

Act 1805, Same, 945, Sec. 1.

It is under this section that complainants claim their franchise. By it the Justices are empowered, *if they should deem it necessary*, on application being made, to authorize the establishment of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, etc.; *Provided*, That the Legislature shall, at all times, retain the power of making such alterations in the establishments, made by the Justices of the Inferior Court, as to them may seem proper."

Act 1818, page 952, Sec. 29, authorized the Court to act "in term time while sitting for ordinary purposes, or at a special meeting held for that purpose."

These acts embrace the whole law on the subject, and from it the following conclusions are made:

1. The Justices were only authorized to act "on application being made."

2. The word used is *established*.

3. The establishment of bridges was discretionary with them.

4. They were authorized to establish as many bridges as they thought necessary, other than those already established by law.

5. There is no express authority to establish one bridge only, with exclusive privileges within any given limits. Such authority cannot be found in the words of the act, nor can it be reasonably

implied from them. On the contrary, the authority to establish such *other bridges* as they may think necessary expressly negatives such a construction.

6. By the proviso it is clear that their powers were limited, and that the power to make exclusive grants remained in the Legislature.

It was not until the 12th of December, 1855, when the Constitution was amended, that the Legislature divested themselves of the power to establish bridges.

Acts 1855-6, page 106, Sec. 2.

The only authority the Justices had to make contracts in reference to bridges, related to the building of County bridges. And the mode in which that power should be exercised and money raised to pay for the bridge is specifically prescribed,

Cobb's Dig. 958, Sec. 65. Code 669, 671.

———o———

Public grants are construed most strongly against the grantee. The grantee takes nothing by implication and can claim nothing not expressly set forth in the act under which the grant is made.

13 How 81. The Rich. R. R. Co. vs. The Louisa. R. R. Co.

Code 2362. 2234.

11 Peters 544; Charles R. B. Co. vs. Warren B. Co.

8 How. 579.

1 Kelly 533.

3 Kelly 31 (3).

5 Kelly 561; Powers of Corporation.

7 Ga. 221.

9 Ga. 517 (3) (4), 524, 213, 221, 475.

8 Bush 31.

9 N. Y. 451-2-3; Auburn & Cato Plank R. Co. vs. Douglass, and authority quoted.

In this case it was held that the grantees take nothing by implication either against the power making the grants or against other corporations or individuals. See head note 444.

6 Wend 85.

25 Ga. 445 457; McLeod et. al. vs. The Sav. & Albany R. R. Co.

27 N. Y. 92-3.

21 Penn. 22; The Penn. R. R. Co. vs. The Canal Comr's.

30 N. Y. 44, 53 62; Fort Plain Bridge Co. vs. Smith.

4 Green (Iowa) 532.

Dillon on Municipal Cor. 124.

Cooley on Const. Lim. 196-7 and note.

In the case in 13 How. 71, The Richmond F. & P. R. R. Co. vs. The Louisa R. R. Co., the Legislature of Va. had pledged itself in the charter of The Richmond R. R. Co. for a consideration which had been performed, not to allow any other railroad to be constructed within certain limits, the *probable effect* of which would be to diminish the number of passengers on that road, or compel the company, in order to retain such passengers, to reduce the passage money.

It was held, 1., "That this stipulation was to be construed strictly as against the corporation. 2. That it was not violated by chartering another road, within the limits named, which might be used, exclusively, to transport merchandise. Though the charter of the second road did not limit its use in any respect.

In the case in 9 Ga. 525, it was held that corporations take nothing by implication, that such grants are designed to promote the happiness, prosperity and convenience of the people. And, quoting from the opinion of Chief Justice Taney, the Court says, "When a corporation alleges that a State has surrendered for seventy years (in the case at Bar *forever*) its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist that its abandonment ought not to be presumed in a case, in which the deliberate purpose of the State to abandon it, does not appear."

A provision that no Court or County Commissioners should license another ferry, that power then being vested in no other municipality, does not prevent the Legislature from authorizing, by a subsequent act, a city to license one.

16 How. 524, *head note*; Fanning vs. Gregoire & Bogg.

Unless exclusive privileges are granted, no reservation of the power of repeal is necessary to be made in the grant. Same.

11 Leigh 70 to 74; Tuckahoe Canal Co. vs. Tuckahoe R. R. Co.

35 Miss. 189.

4 Iowa 532; McEwen vs. Taylor.

1 Black 43, Sec. 4, 446; Jefferson Branch Bank vs. Skelly.

6 Page 554, 564-5; The Mohawk Bridge Co. vs. The Utica & Schenectady R. R. Co.

12 La. 649; Curtis & Phelps vs. The Parish of Morehouse.

31 Miss. 679, 699; Collins et. al. vs. Sherman.

3 Wall. 210, Turnpike Co. vs. The State.

Unless the whole Legislative power was delegated to the Justices and unless the Justices had exclusive powers and authority, they had no power to grant exclusive privileges to others.

Authority to *establish* bridges and ferries does not convey the power to grant exclusive rights.

And especially is this true, if the Justices were authorized to establish as many bridges, other than those already established by law, *whenever* and *wherever* they may deem such bridges necessary.

25 Wend 628; Costar vs. Brush.

Charter N. Y. 1730, Sec. 15.

8 How. 579; Mills vs. Co. of St. Clair.

7 Ga. 352; Williams vs. Turner.

6 Ga. 130 (3) 144.

15 Pick 243.

In the case in 25 Wend 628, Costar vs. Brush, the city of New York possessed the whole power of the Legislature, or of the crown over the subject. The extent of that power is partially explained in the case of Furman vs. The Mayor and Council of New York. 10 N. Y. Rep. 567. It was there held that the city were the "owners in fee simple absolute" "by virtue of its ancient charters, confirmed by the Constitution of the State, the land under water along the East and North rivers, to the extent of four hundred feet beyond the line of low water mark, at the time when the charters were granted."

No such power or authority was ever owned or possessed by the Justices of the Inferior Court.

15 Sec. N. Y. Charter 1730; confirmed by Const. of the State; See 10 N. Y. Rep. 567.

And we do by these presents of our especial grace, certain knowledge and meer motion, give, grant, ratify and confirm unto the said Mayor, Aldermen and Commonalty of the City of New York and their successors forever, All those the now City Hall and Goale Rooms, or place for the Courts of Justices and Chambers adjoining, with the ground and appurtenances thereto belonging, the five Market Houses, the Great Dock, the new Crane and Wharf with the Common Shore leading through the Great Dock and Bridge, and also the Magazine or Powder House, near the fresh water, all in the City of New York and the ferry and ferryes on both sides of the East River and all other ferryes now and hereafter to be Erected and Established all round the Island Manhattans and the management and rule of all fees ferriages and Perquisites to the same or any part thereof belonging or to belong, and also

the ferry Houses on Nassau Island with the Barnes, Stables, Pen or Pounds and Lott of ground thereto belonging, and also all the ground soil or Land between High water and low water mark on the said Island of Nassau from the East side of the place called Wall, about to the West side of red Hook, and also to make Laws and rules for the governing and well ordering of all the ferryes now Erected or Established or hereafter to be Erected or Established round the said Island Manhattans and all the vast vacant unpatented and unoppropriated Lands Lying and being within the said City of New York and on Manhattans Islands aforesaid extending to low water marke together with the right, benefit and advantage of all Docks. Wharfs, Cranes and slips or small Docks within the City with the Wharfage, Cranage and Dockage and all Issues, Rents, profits and all Rivers, Rivoletts, Creeks, Coves, ponds, water Courses, ffishing, ffowling hunting and Hawking, Mines and Mineralls and other Royalties and priviledges within the City of New York and Mannattans Islands, "And also all and singular other the rights priviledges, Liberties, ffranchises, Preheminences, Advantages, Jurisdictions, Courts, powers, Offices, Authoritys, Markets, fferrys, fferriages ffees, ffines, Amerciaments, perquisites, proffits, Immunities, Lands, Tenements, Rents, possessions and Hereditaments and othee Real Estate not only which in the before recited Letters patent of Queen Anne mentioned or Intended to be thereby or by either of them granted or conveyed, but also which the Mayor, Alderman and Commonalty of the City of New York or their predecessors, Inhabitants or Citizens of the said City of New York or any part thereof by whatsoever other name, Stile or Title they, or any of them, have been known or called, have held or claimed to hold by prescription or otherwise (silver and gold mines Excepted) and also Except our ffort George in our City of New York and the ground ffull Boundaryes and Extent thereof or thereto belonging, and also that peece of ground near the English Church, called the Governour's garden, and the Land called the King's ffarm with the Swamp next to the same and Saving the Several Rents reserved by virtue of former Grants and saving to all other persons, bodys, politick and corporate their respective Titles to any of the said Lands or Tenements and saving to the Inhabitants of those that have plantations by the water, between Wall about and red hook, the right of transporting themselves and their own goods only in their own boats from and to their respective Dwellings or plantations without paying fferriage. To have and to hold all and singular the premises aforesaid and

every part and parcell thereof (Except and saving as is herein Excepted and saved) unto the said Mayor, Aldermen and Commonalty of the City of New York and their successors forever to their only proper use and Behoof forever."

In the case of Mills vs. St. Clair Co., 8 How. 579, the charter was granted by the Legislature direct to the grantees. Sam'l Wiggins, his heirs and assigns, with exclusive privileges with power reserved in the charter, to the Legislature, to repeal the exclusive part of the grant, if the public good required it.

Wiggins complied with his contract, purchased lands, built and equipped the ferry, under the Act of 1819 and 1821. Wiggins claimed a perpetual privilege and exclusive ferry privilege for two miles on the river front. The exclusive part of the grant was repealed in 1833, and another ferry authorized "at that place" in 1839, which was opened.

The Courts held that the second grant did not violate the contract. Wherein does the case differ from the case at bar? In the one power was reserved over the grant in the charter made by the Legislature. In the other full power was not delegated to the Justices by the statute, but it was reserved to the Legislature in express terms, and complainants hold only under these statutes.

In the case in 7 Ga. 352, Williams vs. Turner, the Court held "The paramount control over the whole subject is retained by the Legislature, and it may grant as many ferry rights as it pleases, and if a prior grant is injured by a second grant, the first grantee has no right of action. It is *danum absque injuria*."

"An Act incorporating a town and vesting the authority of a town with certain powers does not divest the State or County Courts of powers vested in them by the general law, unless the act of incorporation declares the powers in the corporation to be exclusive"

Baldwin vs Green, 10 Miss. 410.

"The right given to the city of Louis., by its charter, to license and tax ferries within its limits, is not exclusive, and does not take from the State the right to license and tax the same ferries."

Harrison vs. State, 9 Miss. 530.

U. S. An. Dig. 1848, 75 and 195, 10 How 511; East Hartford vs. Hartford Bridge Co

13 Ill. 413, 424, 428 9-30.

Gales et. al. vs. Anderson et. al,

In this case the words of the statute are "establish and confirm." The statute also gave exclusive privileges "over and across the

same." Held that these words limited the exclusive privileges to the use of the bridge alone. and extended no further. The statute is much broader than ours, and yet the power to make exclusive grants was denied.

9 Mo. 530; Harrison vs. The State of Mo. The power is denied in this case, because the word *exclusive* was omitted from the act of the Legislature.

21 Cal. 238, 252-3; Fall vs. County of Sutter.

The statute referred to in this case is as broad as the Ill. act, and grants exclusive privileges within certain limits, except when public convenience required another bridge. Held among other points that the licensing power was the sole judge of the exigency.

25 Conn. 31; The Norwich Gas Light Co. vs. The Norwich City Gas Co.

Held the city was unauthorized to grant exclusive privileges to lay gas pipes in the streets, and that such a grant was void.

4 Cold 406; Memphis City R. R. Co. vs. Memphis.

U. S. An. Dig. 1868, 128 (175.)

Held in this case: "A municipal corporation cannot, by contract, confer upon individuals the exclusive right of constructing and operating street railroads on the public streets for their own benefit and use."

2 Porter 296; Dyer vs. The Tuscaloosa Bridge Co.

10 Ala. 38; The Mayor and C. of Columbus vs. Rogers et. al.

In this case the Legislative grants of Ga. to Columbus and of Ala. to McDougal, who conveyed to the city of Columbus, were exclusive.

———o———

The Inferior Court held a public trust, a limited legislative power; and could not, by any exclusive grant it might make, impair its exercise, by themselves or their successors, restrict its use, or part with its power.

10 How. 535-6 East Hartford vs. Hartford Bridge Co.

6 Wheat 596 8; Gozzler vs. Corporation of Georgetown.

5 Cowen 538; Presbyterian Church vs. The City of N. Y.

12 Ill. 1; County of Richmond vs. The County of Laurence

It was held in the case in 10 How. 535: That Towns and Counties possess only public, political or legislative power, to be exercised solely for the public good, subject at all times to legislative control,

17 Barb Sup. ct. Rep. 435; Millian vs. Sharpe.

27 N. Y. 611, 622; Same case.

20 N. Y. 370; Aiken vs. The Western R. R. Co.

32 Maine 431: Green vs. The City of Portland; Head note.

"A corporation has no powers except those expressly conferred and such as are necessary for the exercise. A municipal corporation holds its powers in trust and cannot delegate them.

The Trustees of the town of Oakland had, by St. 1852, power to make and maintain wharves, etc. They granted to A. B. the exclusive right to maintain wharves for a term of years. Held that the grant was a transfer of their corporate power, and, therefore, void.

That the city of O., which succeeded to the town of O., could have the grant cancelled and the wharves surrendered by A. B."

13 Cal. 540; Oakland vs. Carpentier.

U. S. Dig. 1860, 225.

To same effect is the case of State of N. Y. vs. The Mayor and Ald. of city of N. Y. 3 Duer (N. Y.) 119. U. S. An. Dig. 1856, 158 (194.)

This was an exclvsive grant to a R. R. Co. over Broadway.

2 T. R. 169.

25 Conn. 19.

1 Strange 299.

2 Strange 1161.

7 Cowen 586, 606-7; Stuyresant vs. The Mayor of N. Y.

6 Dana (Ky.) 43, 47, Head note; Carter & Arnold vs. Kalfus & Watts.

In this case the ferry was, by statute of Ky., exclusive within 1½ miles, except when the public interest required others. A second grant was sustained.

18 Ohio 262; The State ex. rel, vs. The Cin. Gas Light & Coke Company.

This case is conclusive on the points made in complainant's bill. See the whole case.

23 Howard 435.

Dillon on Municipal Cor. 78-9 and 80.

Cooley on Const. Lim. 206-7 and note.

In the case in 6 Ga. 130. The prayer in the bill is similar to the prayer in the case at bar. See page 134.

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The case in 9 Ga. 517, Shorter et. al. vs. Smith, contained in the prayer of the bill most of the points made in this case.

Three grounds of relief were at forth in that case, viz:

1. A prescriptive ferry right across both rivers.

2. By virtue of a solemn contract between the complainants and county court it was claimed the court was bound for a valuable consideration, to continue to complainants the sole and exclusive use of their franchise.

3. The right was claimed, because the contract had been recognized by all preceding courts.

See page 521.

These questions were decided adversely to complainants in that bill.

See page 530.

See 5, 9 Ga. 517, does not hold that the Inferior Court may grant exclusive privileges. It is not so set forth in the head note, or in the body of the decision. This question was not in that case.

In every case in which private persons or corporations have maintained exclusive rights against the public the grants were issued by the Legislature of the State, or by the Crown, or by some officer or corporation vested with the *whole* Legislative authority and power of the Legislature or of the Crown. And it is extremely seldom that such authority is ever delegated by the State.

In such cases the Legislature cannot resume the franchise without compensation, and in such cases only is this the rule.

The provision for the admeasurement of distances by the meanderings of the stream, in cases where persons hold exclusive bridge or ferry privileges, contained in Cobb's Dig., page 957, Sec. 63, and in the Code, Sec. 682, was originally a provision of a local act, and referred only to grants by the Legislature.

See Act 1841, Pam. 187. It was made in view of such grants only. It is safe to say, with the exception of the case at Bar, there has never been an exclusive grant made by any Inferior Court of this State.

That portion of the decision in 9 Ga. 517, bearing on this question, was made solely with reference to Legislative grants. See pages 526-7. and head note 5.

The following are the exclusive grants referred to in that case, all of which were made by the Legislature of this State, to-wit:

A grant of certain exclusive rights:

To The Central Railroad and Canal Co. of Ga.

Prince Dig. 302 (19).

To The Ga. R. R. Co.

Same 304 (33).

To Thomas Spaulding and his associates.
Same 325 (126).
To The Chattahoochie R. R. Co.
Same 343 (199), 367 (305).
To The Western R. R. Co.
Same 349 (228.)
To The Flint & Chattahoochie R. R. Co.
Same 368 (316).
To The St. Mary's & Columbus R. R. Co.
Same 376-7 (359, 365).
To The Auraria & Blue Ridge Turnpike Co. and the Union Turnpike Co.
Same 404 (109).
To The Columbus Canal & Water Co.
Same 412 (159).
To The Steam Boat Co. of Ga.
Same 299 (Sec. 7).

To Joseph Hill, his heirs and assigns, exclusive bridge privileges across the Great Ogechee. Act 1806. And to Wade Hampton and James Gunn. Act 1790.
25 Ga. 445.

To Jessie McCall, exclusive bridge privileges for 15 years, for 5 miles above and below his bridge. Act Dec. 3, 1804.
Clayton's Compilation 184.

To Sarah McLeod, exclusive bridge privileges 3 miles up and down the river Ohoopee.
Act 13, Dec. 1811,
Lamar's Dig. 116.

To John McKinne and Henry Shultz, exclusive bridge privileges for 20 years across the Savannah river at Augusta, within 4 miles of the bridge.
Act Nov. 9, 1814. Same 119.

To James Rosseau, exclusive bridge privileges for 21 years across the Oconee at Milledgeville.
Act Dec. 19, 1817. Same 125.

The city of Macon, in the sale of the Ocmulgee Bridge for 3 miles, perpetual.
Dawson's Compilation 397.

To Joseph Hill, for 5 miles from the bridge, over the Ogeechee.
Marbury & Crawford's Dig. 297 and 582. Act 1806. The word *establish* was the word used by the Legislature, when no exclusive rights were given.

Clayton's Comp 472, 476, 559, 369, 432, 568, 272, 576, 688. Act 1841, 187-8.

The Act 1805 authorizing the Inferior Court to establish bridges, etc., is in this Dig.

We find the Legislature of this State exescising the power to establish bridges and ferries with and without exclusive privileges for years after the passage of the Act of 1805. The following Bridges and Ferries were established, from time to time, without exclusive rights. And the word used by the Legislature in making these non-exclusive grants is the word *establish*, the same word used in delegating authority to the Justices in the Act of 1805, viz:

The Bridge of Joseph Phillips.

Act 1808.

Clayton's Comp. 472.

The Bridge of Garrett et. al on Savannah river. They were "authorized and empowered to erect and establish" a toll bridge, and take toll for 13 years.

Act 1809, Id. 576.

Carter's Ferry on the Altamaha in Tatnall County. And Lewis Hall's at Berry Hill Bluff.

Act 1820, Dawson's Comp. 362.

Bussy's and Ware's Ferries across Little river in Lincoln and Columbia counties.

Act 1820, Id. 362.

Joice & Flournoy's Ferry across the Ocenee in Montgomery Co. "Established."

Act 1820, Id. 363.

Adam's Ferry on the Ocmulgee in Jasper county, "An Act to establish and make permanent," etc.

Act 1821, Id. 368.

Emmett & Rall's Ferry across the Ocmulgee in Pulaski county. "Establish."

Act 1821, Id. 368.

Hall Co. Ferry on the Chattahoochie. "Establish."

Act 1821, 368.

May's Ferry on the Altamaha in Appling Co. "Established."

Act 1821, Id. 369.

Sowells & May's Ferries on the Ocmulgee in Jones Co. "Established."

Act 1821, Id. 369.

Scott's Ferry on the Ocmulgee in Jasper Co. "An Act to establish and make permanent," etc.

Act 1821, Id. 369.

Patterson's Ferry across the Ocmulgee. 'An Act to establish and make permanent," etc.

Act 1821, Id. 369.

Cargiles & Wise's Ferries on the Ocmulgee in Jasper Co. "An Act to establish and make public," etc.

Act 1821, Id. 369.

Jno. Floy's Toll Bridge over the Appalachie. "Established."

Act 1822. Id. 374.

And also the following Bridges and Ferries by the use of this word:

Francis Martin's, Jasper County.
John Town's, " "
Denny's Ferry, Elbert and Madison Counties.

All in 1822, Id. 375.

Town Bluff	Ferry		Appling	County		Id.	376
Hartford	"		Pulaski	"		"	"
Bozeman's	"		Gwinnett	"		"	"
Richardson's	"		Dooley	"		"	378
Silver Bluff	"		Pulaski	"		"	379
John Keener's	"		Houston	"		"	381
J. Richardson's	Toll Bridge		Walton	"		"	"
J. Hardy's	Ferry		Jasper	"		"	"
G. A. Brown's	"		Long Shoals			"	384
Man's	"		Warren	"		"	385
McWright's	"		Gwinnett	"		"	"
Jas. Kemp's	"		Tatnall	"		"	386
Middlebrook's	Toll Bridge		Clark	"		"	"
Vesey's	Ferry		Houston	"		"	"
Calhoun's	"		Upson	"		"	"
Tinsley's	"		Early	"		"	"
Pitt's	"		"	"		"	387
Lewis'	"		Jones	"		"	"
Grey's	"		"	"		"	"
Gibson's	"		"	"		"	"
Terrell's	Bridge		Green	"		"	"
Hardin's	Ferry		Decatur	"		"	388
Phillip's	"		Pike	"		"	393
Lumpkin's	"		Dooley	"		"	"
Phillip's	"		Monroe	"		"	"
Light's	"		Hall	"		"	394
Rushin	"		"	"		"	"
Gates'	"		Gwinnett	"		"	395
Turrentines'	"		Pike	"		"	"

Making in all 50 Bridges and Ferries established by the use of this word, without any exclusive privileges whatever.

A number of others were so established and many others authorized by the use of the word *erect.*

See Clayton's Com. 476, 369, 432, 568, 688.

Lamar's Dig. 118, 122, 124, 125.

Dawson's Com. 362, 363.

In nearly all of the above grants the right to take toll was limited to from 13 to 25 years, without exclusive rights.

See Clayton's Com.

To Wm. Smith, exclusive right for 2 miles across Beaver Dam Creek in Screven County, for 10 years.

Act 1815, Lamar's Dig. 122.

To The Trustees of German Lutheran Congregation, exclusive bridge privileges for 6 miles, and for 40 years, over Ebenezer Creek, *reserving the right to repeal the franchise.*

Act. 1821, 366 of Dawson's Comp.

These are the kind of grants referred to by the Court, when the case of Smith vs. Shorter was decided.

So it is clear that Sec. 5, page 527 of 9 Ga. refers only to Legislative grants. And no question of the kind made in complainant's bill was then before the Court. The authority and power of the Justices to make an exclusive grant was neither made or decided.

The Legislature can tie up the hands of the Inferior Court, but that Court cannot tie up the hands of the Legislature, their own hands, or the hands of succeeding courts.

"The Legislature has manifested its repugnance to these monopolies in the most decisive manner," and have authorized all persons who own the land on both banks of the stream to erect bridges and charge toll at their own expense.

Act 22, Feb. 1850, Cobb's Dig. 958.

Code 684.

This act was passed 18 months before the alleged charter of complainants was obtained, and it was to say the least of the matter taken subject to that Act.

See 9 Ga 527; 20 Ga. 530.

The defendants, and all who may become owners of any part of their said land, and interested in their bridge and streets, are clearly entitled to the unobstructed use of the bridge. The answer distinctly asks the judgment of the Court on this point.

This act was additional limitation on the power of the Justices.

The proviso of the act cannot operate in this case, because it only refers to charters granted before its passage. And it cannot be held to delegate authority to the Inferior Court to grant exclusive rights. The intent and object of it was to the contrary.

The complainants having, knowingly, permitted the erection of the bridge and its completion, with a full knowledge of the use for which it was intended, before filing their bill cannot now enjoin its use and enjoyment by the defendants, or their assigns.
9 Ga. 485.

The bill does not seek to enjoin its use by defendants as a private bridge, but it should have made full conceszion to the right of all parties, who may purchase any part of the lands to its unobstructed use. The notice to them was in writing and in ample time for them to have sought an injunction to prevent any action, if they had desired to do so.

As to what extent a private bridge can be used. See 17 Ala. 584; Harrell & Croft vs. Ellsworth,

Eminent Domain.

The Justices only had power under the statutes to condemn the lands lying in the county for roads, bridges and ferries. To this they are limited in the exercise of the power by the statute, and the mode and manner of exercising it, and of fixing compensation, is expressly provided. The statutes also prescribes the mode of its discontinuance. Any power they could exercise under these laws in favor of grantees and against the public; they could resume or discontinue. Code 604, 608, 637.

Can the Inferior Court resume a franchise, and make compensations? The statute does not seem to give any such authority.

The franchise of the West River Bridge Co., which was granted by the Legislature, and which was exclusive, and the bridge itself, was taken and made a free bridge, by the County Court of Windham County, Vermont. But the statute of that State gave the Court express authority to do so. See 6 Howard 507.

Only a land owner can move for compensation in Ga. The Court cannot move, nor can any adverse party.

Code 637.

Such a grant as complainants claim is against the policy of the law.

It is to them, their heirs and assigns *forever*.

We have seen the Act of 1843 which limits charters to 14 years, the Code to 20 years, and that the Code limits such licenses to 10 years.

All patents and copy rights are limited.

In the case in 11 Peters the charter was limited to 70 years. And that was held against the policy of the law.

How stands, then, the case of a *perpetual grant* made by the Justices without authority of law, and clearly beyond their powers?

The use of defendants' bridge interposes no physical obstruction to the enjoyment of complainants' bridge by them, or by the public, or the collection of tolls over the same. Bridges are not authorized for remunerative purposes to the owners, but for the benefit of the public, whose interest is their first and paramount object.

American Law Reuiew, Oct. '72, page 238.
8 Bush; Piatt vs. C. & C. Bridge Co., 31.
2 Cowan; Sprague vs. Birdsall 419.
2 Porter 226; Dyer vs. Tuskaloosa B. Co.
7 Pick. See map.
11 Peters 420; Charles R. B. Co. vs. Warren B. Co.
1 Duval 135; Richmond & Lex. Turnpike Road vs. Rogers.
16 Conn. 149; Hartford Bridge Co. vs. East Hartford.
17 Conn. 79 " "
10 How, 51 " "
17 Conn. 454, Endfield Bridge Co.
29 Conn. 210; Hartford Bridge Co. vs. Union Ferry Co.

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J. Brannan